STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

JOHNNY RAY KENNEDY,

Defendant-Appellant.
_____/

Supreme Court No. 154445

Court of Appeals No. 323741

Circuit Court No. 14-1748-01

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Defendant-Appellant's Supplemental Brief

Oral Argument Requested

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Table of Contents

Table of Authorities

Cases

Constitutions and Statutes

Argument Summary

In Michigan, appellate courts regularly fail to review indigent defendants' requests for access to expert assistance through the constitutional lens required by the United States Supreme Court and the United States Constitution. Instead, Michigan courts have analyzed such claims under MCL 775.15, a statute intended to provide assistance to indigent defendants with service of process and the related costs. The application of MCL 775.15 in that context began only after the United States Supreme Court decision in *Ake v Oklahoma*, which established that such requests should be reviewed under the *Mathews v Eldridge* three-factor due process test. As a result, Michigan's jurisprudence places a higher burden on indigent defendants and unconstitutionally restricts access to expert assistance, even in prosecutions that are largely based on complex and controversial science.

To date, this Court has never considered the application of *Ake* to indigent defendants' requests for expert assistance, nor has it considered whether MCL 775.15 is sufficient to provide defendants with the access to expert assistance that the constitution requires. This case presents this issue squarely, as the state made DNA evidence a central part of its case, including newer and more subjective types of DNA analysis. Defense counsel moved for funds to consult an independent DNA expert. He asserted expert assistance was necessary to vindicate Mr. Kennedy's constitutional right to present a defense and so counsel could effectively cross-examine the state's experts. The trial court denied the request without explanation.

The Court of Appeals analyzed the trial court's refusal to grant funds under MCL 775.15 rather than the constitution – the common practice of Michigan courts. As a result, the Court of Appeals erroneously concluded Mr. Kennedy was not entitled to expert assistance because he failed to show that he could not "safely proceed to a trial" without the expert's *testimony*. See MCL 775.15. This is a higher burden than was established by the Supreme Court in *Ake*.

This Court should grant leave to appeal and/or issue an opinion clarifying that *Ake*, not MCL 775.15, controls courts' analysis of whether a defendant is entitled to expert assistance at the state's expense. MCL 775.15 cannot be used to increase the defendant's burden for establishing a need for expert assistance, nor can it be used to curtail the range of assistance an expert provides the defense. The constitutional analysis must control. To the extent Michigan's jurisprudence suggests otherwise, those decisions should be overruled.

In this case, Mr. Kennedy's defense counsel showed that he needed expert assistance to understand the DNA evidence offered by the state and to prepare for cross-examination of the state's experts. The trial court violated Mr. Kennedy's rights to due process, a fair trial, to present a defense, and the effective assistance of counsel, by refusing to grant him funds for those purposes. This preserved constitutional error requires the state to prove the error harmless beyond a reasonable doubt. The state cannot do that here where the record shows that defense counsel struggled to effectively cross-examine the state's experts and where his own statements at trial demonstrated his failure to grasp the science underlying their testimony.

For all of these reasons, this Court should grant leave to appeal and/or issue an opinion clarifying that *Ake* controls the analysis of this issue, reverse the decisions below, and grant a new trial.

Statement of Facts

Johnny Ray Kennedy was charged with open murder and tried by jury. The state's case was based almost entirely on the testimony of two DNA experts regarding their analysis of 20-year-old evidence swabs. TT ("TT"), 7/14/14 AM 10; TT, 7/15/14 4-95. The DNA test results involved Y-STR analysis, which is newer than traditional STR analysis and results in profiles that are not unique. TT, 7/15/14 83-84. Further, the DNA analysis in this case involved a mixture of multiple male DNA profiles, which involves more subjective interpretation than traditional DNA analysis. TT, 7/15/14 66-70.[1]

The defense sought funds to consult a DNA expert about the DNA evidence in order to prepare for cross-examination of the state's experts, but the trial court denied the request. Defendant's Motion for Appointment of Brian Zubel, Esq., as Expert to Assist the Defense, 3/28/14, attached as Appendix A; Final Conference Transcript, 5/9/14 7-8. Mr. Kennedy's lawyer was forced to defend against the charges at trial without the assistance of an expert on the scientific evidence central to the case. Mr. Kennedy was ultimately convicted of first-degree murder and received the mandatory sentence of life without the possibility of parole. TT, 7/16/14 68-70; Sentencing Transcript, 8/4/14 10.

Background

In November 1993, the body of Tanya Harris was found in a vacant building in Detroit. TT, 7/14/14 AM 43-44, 55, 76. Ms. Harris had been strangled. TT, 7/14/14 AM 31-32. An autopsy was performed and swabs were taken from Ms. Harris' vagina and rectum. TT, 7/14/14 AM 26-27. The swabs remained untested and the case remained unsolved for nearly 20 years. TT, 7/15/14 48.

[1] For more information see *Report to the President: Forensic Science in Criminal Courts*, available at: https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf (accessed 7/26/17).

In 2008, the Detroit Crime Lab, which was responsible for storing and analyzing evidence such as the swabs of biological material collected from Ms. Harris' body, was permanently closed after the discovery of serious errors.[2] The following year, over 11,000 untested evidence kits were discovered in an abandoned and unsecured Detroit Crime Lab warehouse.[3] The kits were from crime scenes dating back to the 1980s.

Following the discovery of the untested evidence in this case, the swabs collected from Ms. Harris' body were finally tested. TT, 7/15/14 48. Shortly thereafter, a state police analyst concluded that DNA on those swabs matched Mr. Kennedy's DNA. TT, 7/15/14 32-33, 35-36. Mr. Kennedy was charged with open murder and prosecuted largely on the basis of this DNA evidence.

The Defense Motion for Funds to Consult a DNA Expert

Before trial, the defense filed a motion for the appointment of a DNA expert. Appendix A. In the motion, defense counsel asserted that the state's case was based upon DNA testing of biological material done by an employee of the Michigan State Police. Appendix A ¶ 3. He further asserted:

> [A] prosecution based largely or entirely upon the presentation of identification evidence based upon DNA poses an especially technical and complex range of issues for defense counsel, as the essence of the prosecution's case is the presentation of a report from a qualified technician or scientist. That report is conclusory and counsel who would render constitutionally effective assistance to his client and zealously confront the witnesses and evidence called in the prosecution's case in chief, must be educated and schooled to no small extent in the science and accepted protocols of DNA extraction, preservation, testing, as well as dangers of contamination

[2] For more information see Bunkley, *Detroit Police Lab is Closed After Audit Finds Serious Errors in Many Cases*, available at: http://www.nytimes.com/2008/09/26/us/26detroit.html?mcubz=0 (accessed 7/26/17).

[3] For more information see National Institute of Justice, *Untested Evidence in Sexual Assault Cases,* available at: https://www.nij.gov/topics/law-enforcement/investigations/sexual-assault/Pages/untested-sexual-assault.aspx (accessed 7/26/17).

> and the steps and measures taken to document a particular test, and to maintain the proper calibration of testing equipment, all just to (sic) some of the areas in which counsel must be prepared to cross-examine.

Appendix A ¶ 4. Counsel asked the trial court to appoint Brian Zubel, a qualified expert in DNA evidence to assist him,[4] because such assistance was necessary to effectuate Mr. Kenney's Sixth Amendment rights. Appendix A ¶¶ 9-10.

At the final conference, the trial court heard argument on the motion and had the following exchange with defense counsel:

> MR. HOLLER: My position is this is a case of scientific and complex nature. And Mr. Zubel is recognized as an expert in the field of this matter and going to be at a conference on June 6th and 7th presenting as a recognized expert in the field litigation in the area of forensic science and DNA up in Frankenmouth (sic) and attached is my motion and see that he tried a great number of cases over many years as a prosecutor and he's also been a lecturer and speaker and authored many articles on this matter.
>
> And in order to preserve the high quality of criminal representation that Wayne County is proud of and we recognized for (sic).
>
> So I am asking that the Court appoint this gentlemen (sic) as an expert to consult I don't anticipate him testifying but for me to consult with I am going to get a lot of scientific evidence here and I simply would like to consult with him in his expertise analysis.
>
> THE COURT: I'm not going to appoint him for that. You can talk to him you can read up on him and go to the conference which all the rest of us have done that that (sic) motion is denied.

Final Conference Transcript, 5/9/14 7-8.

[4] Mr. Zubel has a background in DNA and other forensic sciences, and is also a licensed attorney. See curriculum vitae, attached in support of defense counsel's motion (Appendix A). Mr. Zubel has a degree in biology and was admitted to the American Academy of Forensic Sciences in 2008. Since 2006, Mr. Zubel has maintained a practice as a consultant and expert in DNA and other forensic sciences.

The Trial

In her opening statement, the prosecutor told the jury:

> The facts of this case, the physical evidence of this case and *the science of this case will show you that the Defendant killed Tanya Harris* in November of 1993. It's really that simple.

TT, 7/14/14 AM 10 (emphasis added).

Tanya Harris was 26 years old at the time of her death. TT, 7/14/14 AM 18. Around that time, she had a problem with crack cocaine and was known to work as a prostitute. TT, 7/14/14 AM 18-19, 64.

On November 17, 1993, Ms. Harris' body was found in the basement of a vacant office building in Detroit. TT, 7/14/14 AM 43-46, 55, 76. Officers responded to the scene and a crowd began to gather. TT, 7/14/14 AM 43-44, 55, 58.

One person in the crowd was a woman named Kay Russell, who told officers that she saw a man known as "Big Mike"[5] with Ms. Harris about 18 hours earlier. TT, 7/14/14 AM 56-57, 60, 62-63. Officers questioned Big Mike. TT, 7/14/14 AM 60-61. They decided that Big Mike was not a suspect in the case because the report of when he was last seen with Ms. Harris was not consistent with information from the medical examiner that Ms. Harris had been dead for "two to three days" when she was found. TT, 7/14/14 AM 83.

Later, another woman, Linda Hinton, reported to police that Big Mike approached her and said "Did you know I killed Tanya?" TT, 7/14/14 AM 84, 99-100. Police did not reopen their investigation into Big Mike as a suspect. TT, 7/14/14 AM 99-100.

[5] Big Mike's legal name was Michael Williams.

The Autopsy

Ms. Harris died at least 24 hours before the autopsy was performed, and probably a little longer than that. TT, 7/14/14 AM 36. The autopsy was performed on November 18, 1993, so she must have died on November 17, or possibly earlier. TT, 7/14/14 AM 36.

DNA Evidence

Amy Altesleben is a forensic scientist with the Michigan State Police Crime lab. TT, 7/15/14 4. She analyzed items from this case described as "vaginal swab" and "rectal swab," and a sample of blood from Ms. Harris. TT, 7/15/14 19. She first added chemicals to the samples to cause the cells to break open and release DNA. TT, 7/15/14 19. Ms. Altesleben then determined how much DNA there was, and amplified the existing cells, replicating specific portions of the DNA. TT, 7/15/14 20. Finally, she added the amplified product to an instrument that detects DNA types in specific locations along the amplified product. TT, 7/15/14 20.

In Ms. Altesleben's opinion, each of the swabs contained DNA that was consistent with the DNA from Ms. Harris' blood sample. TT, 7/15/14 21. In addition, both samples contained DNA from a single male donor. TT, 7/15/14 21-22.

Ms. Altesleben entered the male profile from the rectal swab into the CODIS database. TT, 7/15/14 22. The search returned an association with an individual whose profile was already in the database. TT, 7/15/14 24. That individual was Mr. Kennedy. TT, 7/15/14 25.

Ms. Altesleben requested a sample from Mr. Kennedy to compare with the DNA samples from the vaginal and rectal swabs. TT, 7/15/14 26-28. She concluded that Mr. Kennedy's DNA matched the male profile found on both the vaginal and rectal swabs. TT, 7/15/14 32-33, 35-36.

Typically, once an identification is made, there is no further testing done by the state crime lab, absent extenuating circumstances. TT, 7/15/14 51. In this case, the prosecutor contacted the

crime lab and specifically asked for the lab to do further testing on the fingernails to develop her case. TT, 7/15/14 52. That request was initially denied, until the prosecutor renewed her request to the manager of the state crime lab. TT, 7/15/14 53; Emails from prosecutor to state crime lab staff, originally filed as exhibits to Mr. Kennedy's pro per Application for leave to appeal, and attached as Appendix B. The crime lab agreed to test the fingernails. TT, 7/15/14 53.

The swab from the left fingernails contained a mixture of DNA that included Ms. Harris' profile and one or more additional donors. TT, 7/15/14 40-41. Mr. Kennedy could not be excluded from being a contributor to that sample. TT, 7/15/14 41-42.

The swab from the right fingernails included a mixture of DNA that included Ms. Harris' profile and one or more additional donors. TT, 7/15/14 44. The other donor contributed only a limited profile, so it was not possible for Ms. Altesleben to reach any conclusions. TT, 7/15/14 44.

Finally, Ms. Altesleben concluded that the samples from the fingernails were adequate for further analysis, including Y-STR testing. TT, 7/15/14 45. Y-STR testing is a specific type of DNA testing that focuses on the Y-chromosome, which is only found in males. TT, 7/15/14 77-78. For this reason, the DNA profiles used in Y-STR testing are not unique to individuals; men related paternally will share the same Y-STR profile. TT, 7/15/14 83.

Andrea Halvorson is a forensic scientist with the Michigan State Police. TT, 7/15/14 74. She performed Y-STR testing on a sample from Ms. Harris' left fingernails. TT, 7/15/14 80. Testing results indicated the sample contained DNA from at least three male donors. TT, 7/15/14 80. Of the three or more male donors, one was a major donor. TT, 7/15/14 80. In Ms. Halvorson's opinion, the major donor profile matched Mr. Kennedy. TT, 7/15/14 80. Her conclusion was based upon her identification of six locations where the mixture sample matched Mr. Kennedy's DNA types. TT, 7/15/14 82. She concluded that the likelihood of finding a match to the major donor in the African American population is one in 1,000. TT, 7/15/14 84.

Ms. Halvorson performed additional Y-STR testing on a sample from Ms. Harris' right fingernails. TT, 7/15/14 82. Her analysis yielded only a partial profile; Mr. Kennedy's DNA types matched two of the analyzed locations. TT, 7/15/14 82-83. She concluded that the likelihood of finding a similar match to the major donor in the African American population is one in two. TT, 7/15/14 90.

At times, defense counsel struggled while questioning the state's expert witnesses. For example, he repeatedly asked Ms. Altesleben to confirm he was using the proper terminology, see e.g. TT, 7/15/14 61-62, and repeatedly asked Ms. Halvorson to explain terminology to him. TT, 7/15/14 85, 86-87, 89-90. Defense counsel used his cross-examination to ask Ms. Altesleben to re-explain the process of DNA analysis, TT, 7/15/14 60-62, even though she had already done so during direct examination. Later, he asked Ms. Altesleben to re-explain the significance of the statistical analysis, saying, "I know that you told us once but I didn't understand that." TT, 7/15/14 71. He continued to struggle with the concept. TT, 7/15/14 71-72, 88-89. Defense counsel also conflated the two distinct types of DNA testing involved in this case, Y-STR and STR. TT, 7/15/14 69.

At one point, defense counsel attempted to question Ms. Altesleben about a 2009 National Academy of Sciences Study recommending that forensic labs be independent of law enforcement agencies, but the prosecutor objected, based on a lack of proper foundation and argued counsel's assertion was not true in front of the jury. TT, 7/15/14 57-58. Defense counsel said that he did lay a proper foundation, but did not offer any other substantive response to the objection. TT, 7/15/14 57-58. The judge sustained the objection and defense counsel moved on. TT, 7/15/14 57-58.

Evidence Admitted Pursuant to MRE 404(b)

In 1995, Mr. Kennedy confessed to police that he killed Cynthia McGee. TT, 7/14/14 PM 12. They were smoking crack in Mr. Kennedy's apartment, when Mr. Kennedy realized Ms. McGee had taken money from him. TT, 7/14/14 PM 12. Mr. Kennedy and Ms. McGee got into a scuffle and he strangled her. TT, 7/14/14 PM 12.

Mr. Kennedy pled guilty to one count of second-degree murder and served 20 years in prison. TT, 7/15/14 115. This information was offered into evidence through the testimony of the law enforcement officer to whom Mr. Kennedy confessed and through an additional lay witness. TT, 7/14/14 AM 66-75; TT, 7/14/14 PM 3-17. It was admitted pursuant to MRE 404(b) to show intent, identity, common scheme, and lack of accident. Motion Hearing Transcript, 7/11/14 41.

The Defense

Mr. Kennedy testified in his own defense. In November 1993, he was living at 7 Mile and Ryan. TT, 7/15/14 106. Also at the time, Mr. Kennedy would get high and hang around the Cass Corridor, where he worked. TT, 7/15/14 106-108. He did not have a car and would sometimes stay overnight in the Cass Corridor. TT, 7/15/14 108-109.

Mr. Kennedy occasionally had sex with prostitutes. TT, 7/15/14 107. Mr. Kennedy did not ever assault or kill any of the prostitutes he hired. TT, 7/15/14 110. He could not recall whether he ever met or hired Ms. Harris, but it is possible he did. TT, 7/15/14 108, 118.

Closing Argument

The prosecutor framed this case as one "based on the wonders of technology, the things that are available not (sic) scientifically that were not available in 1993 when Tonya Harris was killed." TT, 7/16/14 7. She repeatedly asserted "We know that the defendant was the last person with

Tonya Harris" before she died because of the DNA evidence, particularly the Y-STR analysis of the mixture found under Ms. Harris' fingernails. TT, 7/16/14 10, 20. She continued:

> But I think what's really telling here is when you get down to it when you get down to the YSTR (sic) testing, which is the last witness that you heard from the lab which talks about the male lineage because if it wasn't the defendant's who did it it (sic) was his daddy, okay.
>
> …
>
> So even if you want to make the argument that other DNA could have been deposited there before the defendant the defendant is still the major contributor, think about that.
>
> …
>
> The science backs up that he killed this woman, he can't get around that.

TT, 7/16/14 21-22.

Procedural History

Mr. Kennedy appealed by right. In his brief on appeal, Mr. Kennedy's original appointed appellate counsel argued, among other things, that:

> Defendant was denied the right to due process and fundamental fairness to present a defense when defendant was denied access to evidence and was denied an expert.

Defendant-Appellant's Brief on Appeal, 11/23/15 17.

In an unpublished per curiam opinion, the Court of Appeals majority affirmed Mr. Kennedy's conviction. Court of Appeals Opinion, 7/16/16, 6-8, attached as Appendix C. The majority concluded:

> In this case, the trial court did not abuse its discretion in denying defendant's motion for the appointment of a DNA expert. Defendant failed to show more than a "mere possibility" that an expert would be beneficial to the defense, as the defense did not offer, nor does the dissent offer, any indication beyond its own speculation that a DNA expert could have provided information that would have been beneficial to the defense. [citing *People v Tanner*, 469 Mich 437, 443; 671 NW2d 728 (2003).] Rather, defendant specifically argued that defense counsel needed additional knowledge in order to confront the witnesses regarding "*any* questionable issues that may have occurred during the lengthy storage and testing procedures." (Emphasis added.) Because neither the defendant nor the dissent identify any specific concerns regarding the DNA evidence in this particular case or provide any indication that the DNA evidence was flawed—and, instead, only articulate generalized concerns regarding the complex, scientific nature of the evidence—there is no basis for us to conclude that the trial court's decision constituted an abuse of discretion.
>
> …
>
> Likewise, we find no basis for concluding that defendant's constitutional rights were violated on that basis and because defendant had an adequate opportunity to present his arguments in the adversarial system, particularly through counsel's thorough cross-examination of the state's witnesses. [citing *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997).]

Appendix C 7-8.

Judge Stephens wrote separately in dissent. Court of Appeals Dissenting Opinion, 7/16/16, attached as Appendix D. She analyzed the issue on constitutional grounds, applying the United States Supreme Court's balancing test established in *Mathews v Eldridge,* 424 US 319, 335; 96 S Ct 893 (1976). Judge Stephens concluded:

> "Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed." *Mathews*, 424 US at 348. "At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost." *Id.* Counsel in this case was very conservative in his request for funds to consult with the expert and not to retain him for trial. It would not have been error for the court to grant that request and require that a second request to retain the expert be made when and if counsel had a particularized issue on which testimony was needed. However, the need articulated by counsel was more than sufficient to require appointment of a consulting expert.

Appendix D 2-3. Thus, Judge Stephens concluded that the trial court's refusal to provide the defense funds to consult a DNA expert in a case in which DNA evidence was the "lynchpin" violated Mr. Kennedy's Sixth Amendment rights. Appendix D 1-2.

Mr. Kennedy filed a pro per Application for Leave to Appeal to this Court. Pro Per Application for Leave to Appeal, 9/19/16. On April 27, 2017, this Court issued an order for supplemental briefing and oral argument on whether to grant the application. In addition, the Court asked for supplemental briefing addressing the following issue:

> [W]hether the trial court abused its discretion under MCL 775.15 and/or violated the defendant's constitutional right to present a defense when it denied his request to appoint a DNA expert. See *People v Tanner*, 469 Mich 437 (2003); *Ake v Oklahoma*, 470 US 68, 74 (1985) ("We hold that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one."); *Moore v State*, 390 Md 343,

> 364 (2005) ("The majority of courts have concluded that *Ake* extends beyond psychiatric experts.").

Supreme Court Order, 4/27/17.

Pursuant to this Court's order, the State Appellate Defender Office was appointed as counsel for Mr. Kennedy. Substitution Order Appointing Counsel, 5/8/17.

Argument

I. The trial court abused its discretion by denying the defense motion for funds to consult a DNA expert where the prosecution's case rested largely on DNA evidence. Without the necessary funds, defense counsel was unable to understand the science involved in the case and form a cogent defense. The trial court's error violated Mr. Kennedy's state and federal rights to due process, a fair trial, to present a defense, and to the effective assistance of counsel.

Issue Preservation

Mr. Kennedy preserved this issue for appellate review by moving for funds to consult a DNA expert in the trial court. Appendix A; Final Conference Transcript, 5/9/14 7-8.

Standard of Review

This Court has previously stated that the standard of review for a trial court's decision regarding the appointment of experts is for an abuse of discretion. *People v Tanner,* 469 Mich 437, 442; 671 NW2d 728 (2003). To the extent the lower court's ruling is based on constitutional questions or other questions of law, however, it is reviewed de novo. *People v Hall*, 499 Mich 446, 451-452; 884 NW2d 561 (2016); *Ornelas v United States*, 517 US 690, 697; 111 S Ct 1657 (1996)("sweeping deference" to "different trial judges" in the absence of any significantly differing facts would allow varied applications of the constitution that is "inconsistent with the idea of a unitary system of law" and "would be unacceptable"). Stated another way, a trial court's decision that rests on a mistaken preliminary application of law is an abuse of discretion. See *People v Denson*, __ Mich __; __ NW2d __ (Docket # 152916, decided July 17, 2017) slip opinion p 8; *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

The beneficiary of preserved constitutional error must establish the error was harmless beyond a reasonable doubt. *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994).

A. Due Process requires the defense have access to a competent DNA expert to assist in evaluation, preparation, and presentation of the defense where the interpretation of DNA evidence is a significant factor at trial.

A defendant's rights and the fairness of his trial cannot be limited by the amount of money in his wallet. US Const, Ams VI, XIV; *Griffin v Illinois,* 351 US 12, 19; 76 S Ct 585 (1956) (There "can be no equal justice where the kind of trial a man gets depends on the amount of money he has."). Injustice occurs where "simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." *Ake v Oklahoma,* 470 US 68, 76; 105 S Ct 1087 (1985). This "elementary principle" derives from the due process right to a fair trial. *Id.*

In *Ake*, the Supreme Court noted that its decision was one of many intended to ensure that even poor criminal defendants have "meaningful access to justice." *Id.* at 76-77 (citations omitted). Meaningful access to justice requires more than the appointment of counsel to assist the defendant with preparing a defense. It requires states to "mak[e] certain that [the defendant] has access to the raw materials integral to the building of an effective defense." *Id.*

Whether the state can constitutionally deny the defendant access to an independent expert turns on the application of a three-factor balancing test. *Ake*, 470 US at 77, citing *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893 (1976). In *Ake*, the Supreme Court applied *Mathews* to determine that the defendant was entitled to the appointment of an independent psychiatric expert where the defendant's sanity was a significant factor at trial. *Ake*, 470 US at 73-74, 78-79. The Court weighed (1) the private interest in the accuracy of criminal proceedings; (2) the state's interest in conserving resources; and (3) the probable value of the assistance sought as compared to the risk of error in proceeding without that assistance. *Id.* at 78-79.

The Court characterized the private interest in accurate convictions as "almost uniquely compelling," and rejected the government's claim that it would be overwhelmed by what it

characterized as the "staggering burden" of providing funds for the defense to have access to an independent psychiatric expert. *Ake*, 470 US at 78-79. In other words, the governmental interest in denying expert assistance was "not substantial." The Court observed:

> Many States, as well as the Federal Government, currently make psychiatric assistance available to indigent defendants, and they have not found the financial burden so great...At the same time, it is difficult to identify any interest of the State, other than that in its economy, that weighs against recognition of this right. The State's interest in prevailing at trial…is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases.

Ake, 470 US at 78–79.

When considering the final factor under *Mathews*, the *Ake* court noted the "pivotal role that psychiatry has come to play in criminal proceedings." *Id.* at 79. The Court expressly recognized that "when the State has made the defendant's mental condition relevant to his criminal culpability….the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." *Id.* at 80. "Thus, while the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy…it has often reaffirmed that fundamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims fairly within the adversary system.'" *Id.* at 77, citing *Ross v Moffitt,* 417 US 600, 612; 94 S Ct 2437 (1974).

The *Ake* court ultimately concluded that "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant has access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Id.* at 83.

As explained in *Ake,* the "pivotal role" a psychiatrist might play in a criminal proceeding is not limited to simply assessing and analyzing the defendant's mental condition, but includes offering opinions to support the defense and knowing "the probative questions to ask of the opposing

party's psychiatrists and how to interpret their answers." *Id.* at 80. The Court recently reaffirmed *Ake,* and clarified the full scope of the potential assistance a psychiatric expert can offer the defense in *McWilliams v Dunn*, __ US __; 137 S Ct 1790 (2017). First, the Court determined that the constitution "required the state to provide McWilliams with 'access to a competent psychiatrist who will…assist in evaluation, preparation, and presentation of the defense.'" *McWilliams*, 137 S Ct at 1798, citing *Ake,* 470 US at 83. The *McWilliams* court clarified:

> *Ake* does not require just an examination. Rather, it requires the State to provide the defense with "access to a competent psychiatrist who will conduct an appropriate [1] *examination* and assist in [2] *evaluation,* [3] *preparation,* and [4] *presentation* of the defense."

Id. at 1800, citing *Ake*, 470 US at 83 (emphasis in original). This requirement was triggered by the undisputed facts that (a) McWilliams was indigent; (b) scientific evidence (psychiatry) was relevant to the punishment he might suffer; and (c) the scientific evidence related to a contested element (Mr. McWilliams' sanity/intent). *McWilliams,* 137 S Ct at 1798 (citations and quotations omitted).

Relying on *Ake*, many other jurisdictions have found defendants entitled to the appointment of various types of experts depending upon the circumstances of the case. See, e.g., *Moore v State*, 390 Md 343, 363-364; 889 A2d 325 (2005) (finding that the majority of courts have concluded that *Ake* extends to non-capital cases and extends beyond psychiatric experts and agreeing with them); *Dubose v State*, 662 So2d 1189, 1192 (Ala, 1995) (holding that together *Ake* and *Caldwell v Mississippi*, 472 US 320; 105 S Ct 2633 (1985) provide that the defendant is entitled to funds for an expert where he shows a reasonable probability that an expert would aid in his defense, and neither case limits the principle to psychiatric experts).

B. MCL 775.15 was not intended to limit defendants' access to experts; the state courts' application of MCL 775.15 falls short of what *Ake* and our constitutions require.

In Michigan, courts often rely upon MCL 775.15 when analyzing a defense request for funds for expert assistance. See, e.g., *Tanner,* 469 Mich at 437.

The statute provides:

> If any person accused of any crime…shall make it appear to the satisfaction of the judge…that there is a material witness in his favor within the jurisdiction of the court, *without whose testimony he cannot safely proceed to a trial*…and that such accused person is poor…the judge in his discretion may…make an order that a subpoena be issued from such court for such witness in his favor…and the witness…shall be paid for attending such trial, in the same manner as if such witness or witnesses had been subpoenaed in behalf of the people.

MCL 775.15 (emphasis added).

The plain language and historical application of the statute show it was not intended to control indigent defendants' access to expert assistance. Rather, MCL 775.15 was intended to provide indigent defendants with compulsory process and assistance with the related costs. It was enacted long before *Ake* was decided and long before the widespread use of scientific evidence in criminal prosecutions.

MCL 775.15 was not modified after *Ake.* As a result, the statute fails to provide the necessary framework to meet the constitutional standards established by *Ake.* MCL 775.15 requires defendants to meet a higher burden than *Ake* in order to establish the need for the assistance. Further, because it is limited to securing testimony, the statute provides a narrower range of assistance than *Ake* requires. For these reasons, this Court should hold that access to expert assistance for indigent defendants is properly analyzed under *Ake* and its progeny, rejecting the ill-fitting and outdated application of MCL 775.15 to such requests.

1. MCL 775.15 was enacted long before *Ake* and the widespread use of science in criminal prosecutions.

MCL 775.15, entitled "Procurement of material witness for accused; procedure; fees," was originally enacted in 1927. MCL 775.15, Historical and Statutory Notes. It was last revised or amended in 1970. *Id.* Since this statute was last amended, the Supreme Court decided *Ake,* establishing the constitutional requirement that defendants have meaningful access to "raw materials integral to the building of an effective defense." *Ake*, 470 US at 76-77 (citations omitted).

In the nearly 100 years since MCL 775.15 was enacted, scientific evidence has become increasingly important and has gained wide-spread use in criminal prosecutions. Today, it is not uncommon for the state to present testimony from experts in numerous fields, including DNA, serology, and ballistics.

As the use of scientific evidence in court has increased, so have the expectations that defense counsel understand and prepare appropriate challenges to such evidence when presented by the state. This Court and the United States Supreme Court have recently recognized the need for defense counsel to consult experts about scientific evidence in the context of ineffective assistance of counsel claims.

In *People v Ackley*, this Court determined that defense counsel performed deficiently by failing to investigate and attempt to secure an expert witness who could testify in support of the defendant's theory. *People v Ackley*, 497 Mich 381, 389; 870 NW2d 858 (2015). Not only that, but counsel was ineffective for failing to secure an expert witness who could "prepare counsel to counter the prosecution's expert medical testimony." *Id.*

Similarly, in *Hinton v Alabama*, the Supreme Court found defense counsel's performance constitutionally deficient where he failed to seek additional funds to replace an inadequate expert related to forensic evidence. *Hinton v Alabama*, __ US __; 134 S Ct 1081, 1088-1089 (2014). When analyzing prejudice, the Court noted:

> That the State presented testimony from two experienced expert witnesses that tended to inculpate Hinton does not, taken alone, demonstrate that Hinton is guilty. Prosecution experts, of course, can sometimes make mistakes. Indeed, *we have recognized the threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensics experts, noting that "[s]erious deficiencies have been found in the forensic evidence used in criminal trials*...One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases." *This threat is minimized when the defense retains a competent expert to counter the testimony of the prosecution's expert witnesses; it is maximized when the defense instead fails to understand the resources available to it by law.*

Hinton, 134 S Ct at 1090 (citations omitted) (emphasis added). As the Supreme Court recognized in *Hinton*, scientific evidence can be subjective and unreliable. As scientific evidence is used more frequently in criminal prosecutions, it is increasingly important for defense counsel to understand the science underlying the state's case.

In 2009, the National Academy of Sciences issued a report entitled, "Strengthening Forensic Science in the United States: A Path Forward."[6] The authors spent two years conducting research and interviews, after which they concluded that in criminal cases forensic science evidence is not routinely scrutinized pursuant to the standard of reliability enunciated in *Daubert v Merrell Dow Pharmaceuticals,* 509 US 579; 113 S Ct 2786 (1973). They also determined that the conclusions reached by forensic practitioners are not always reliable. After investigating various types of scientific evidence, the NAS report concluded that no forensic method has been rigorously shown able to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.

The NAS determined that even DNA evidence is fallible. DNA tests performed on a contaminated or otherwise compromised sample cannot be used to reliably identify or eliminate an

[6] Report available online at: https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf (accessed 7/26/17).

individual as the perpetrator of a crime. NAS report, p S-7. Further, as with any human endeavor, there can be error in performing the testing and making the analysis. See, e.g. *Hinton,* 134 S Ct at 1090. As scientific evidence is used more frequently in criminal prosecutions, it is increasingly important for defense counsel to understand the science underlying the state's case.

Through the state crime lab, the prosecution has numerous experts in DNA analysis on hand, ready to testify on behalf of the state and in support of their conclusions. Not only does the state have experts on hand to testify at trial, prosecutors have ready access to DNA analysts to consult about the evidence as they prepare their cases. Further, the record in this case shows that the state can direct additional testing it believes will be helpful to its case be done, even when that testing is outside the crime lab's standard protocols. Appendix B. The defense has no similar access to independent experts without retaining them. And an indigent defendant like Mr. Kennedy has no access to independent experts at all, unless the state provides him the necessary funds to retain or consult them.

2. Prior to *Ake,* MCL 775.15 was only applied in the context of compulsory process.

MCL 775.15 was enacted nearly a century ago and was intended to provide the defense with a means to obtain and serve subpoenas for necessary witnesses to appear at trial at the state's expense. For example, the statute addresses "material witness[es] in his favor within the jurisdiction of the court." It further provides for the judge to order the issuance and service of a subpoena, with the fees for service to be paid by the state. Finally, it requires the witness be paid for attending trial, "in the same manner as if such witness…had been subpoenaed in behalf of the people." In short, the statute is directed at procuring the appearance of witnesses generally. This is consistent with early state court decisions interpreting and applying the statute. See, e.g., *People v Morris*, 12 Mich App 411, 416-417; 163 NW2d 16 (1968), citing *People v Thomas*, 1 Mich App 118, 125; 134 NW2d 352

(1965); *People v Williams*, 36 Mich App 118, 120; 193 NW2d 201 (1971); *People v Thornton,* 80 Mich App 746, 752; 265 NW2d 35 (1978).

Notably, MCL 775.15 does not address or mention witnesses who are experts or are necessary to provide specialized knowledge. Nor does it mention experts whom the defense might retain to consult, regardless of whether the expert is expected to testify at trial. This makes sense as the statute was not enacted in an effort to comport with *Ake*.

In contrast, MCL 768.20a establishes procedures for the appointment of an independent psychiatric expert in cases where the defendant's sanity at the time of the offense is at issue. This further demonstrates that although our state courts frequently invoke MCL 775.15 to analyze claims related to the defense need for expert assistance, the statute was not intended to address, nor does it comport with a defendant's constitutional rights in regard to expert assistance.

Some early *Ake* claims were decided without reference to MCL 775.15. E.g. *People v Stone*, 195 Mich App 600; 491 NW2d 628 (1992). However, a common practice emerged where the state courts would analyze defendants' requests for expert assistance under MCL 775.15 and forgo the constitutional analysis altogether. This practice began only after *Ake*.[7] Compare *Morris*, 12 Mich App at 411 and *Thornton*, 80 Mich App at 746 with *People v Leonard*, 224 Mich App 569; 569 NW2d 663 (1997).

In *People v Miller*, the Court of Appeals first invoked MCL 775.15 to review a defendant's claim that the trial court erroneously denied his request for expert assistance. *People v Miller*, 165 Mich App 32, 47-48; 418 NW2d 668 (1987). Although *Miller* was decided after *Ake,* the court did not cite or apply *Ake*. *Id.* Instead, the court concluded that the refusal to grant funds for the expert was within the trial court's discretion because the expert testimony was not admissible as a matter of

[7] Appellate counsel does not have access to the briefs from the cases discussed here, so it is unclear whether the state court's application of MCL 775.15 in lieu of *Ake* to this type of claim is the result of the parties' framing or the courts' analysis of the issue.

law under *People v Buckey,* 424 Mich 1, 17; 378 NW2d 432 (1985). *Id.* (concluding that the trial court did not abuse its discretion in denying the request for the assistance of an expert to testify about victim credibility because such testimony invades the province of the jury and is inadmissible as a matter of law) (citations omitted).

Before long, Michigan courts routinely referred to MCL 775.15 when reviewing such claims, requiring the defendant to show he could not "safely proceed to a trial" without the expert, and disregarding the *Mathews* three-factor balancing test. E.g. *Leonard*, 224 Mich at 580-583.

As its plain language makes clear, however, MCL 775.15 was never intended to provide a means for an indigent defendant to obtain the funds necessary to access expert assistance. Instead, it was intended to assist defendants with covering the expense of compulsory process. As our state courts applied MCL 775.15 out of context to analyze defense requests for expert assistance, they developed an unworkable rule untethered from the constitutional requirement that the defense be afforded access to independent expert assistance on scientific matters that the state makes a central part of its case.

3. By relying on MCL 775.15, our state courts have erroneously limited defendants' access to necessary experts, in violation of their constitutional rights.

While Michigan courts routinely analyze defendants' requests for expert assistance under MCL 775.15, they have failed to reconcile the plain language of MCL 775.15 with the controlling federal authorities. By trying to force the analysis of such claims into the outdated and ill-fitting language of MCL 775.15, our state courts have created a series of decisions that violate defendants' due process rights to a fair trial and to present a defense when it comes to the crucial issue of expert assistance. See *People v Jacobsen,* 448 Mich 639; 532 NW2d 838 (1995); *Tanner*, 469 Mich at 437; *Leonard*, 224 Mich App at 569. Two of those decisions formed the basis for the Court of Appeals' erroneous decision in this case. See *Tanner*, 469 Mich at 437; *Leonard*, 224 Mich App at 569. These

decisions have resulted in a scheme that denies defendants expert assistance to which they are entitled under the federal constitution.

The first time this Court applied MCL 775.15 to address a request for expert assistance was in *Jacobsen*. This Court analyzed the issue only under state law and did not consider *Ake* in any way, nor did it apply the three-factor balancing test from *Mathews*. *Jacobsen*, 448 Mich at 639. Instead, the Court applied MCL 775.15 to conclude that a defendant must "show a nexus between the facts of the case and the need for an expert" in order to be entitled to expert assistance at the state's expense. *Id.* at 641.

In *Jacobsen*, the Court announced a new standard that would be applied to such claims going forward: "Without an indication that expert testimony would likely benefit the defense, it was not error to deny without prejudice the motion for appointment of an expert witness." *Id.* This new standard was derived solely from the statutory language, and was wholly devoid of constitutional considerations. See *People v Jacobsen,* 205 Mich App 302, 310; 517 NW2d 323 (1994) (dissenting opinion), endorsed by this Court in *Jacobsen,* 448 Mich at 641. It has since been applied to require a defendant to make a specific and affirmative showing that expert *testimony* would *necessarily* benefit the defense *at trial* in order to gain access to funds for any expert assistance.

In *Leonard,* the defense sought funds to retain a DNA expert to prepare for a suppression hearing related to DNA identification evidence. *Leonard,* 224 Mich App 576. At the hearing, the state presented several witnesses who testified about the DNA testing and results. *Id.* at 574. The trial court authorized counsel to retain an expert at the court's top rate, but that was less than defense counsel's expert required. *Id.* at 574-575. Defense counsel was unable to find another expert who would work for the court's rate and so went forward with the suppression hearing and trial without expert assistance. *Id.* He stipulated to the admission at trial of the state's experts' testimony from the

suppression hearing. *Id.* Following Leonard's conviction, the trial court granted a new trial on the ground that Leonard was entitled to a DNA expert at trial. *Id.* at 577.

The Court of Appeals reversed, taking issue with the trial court's conclusion that the defendant was "entitled" to a DNA expert at trial. *Id.* at 579. Instead, the Court of Appeals countered, the defendant must show a nexus between the facts of the case and the need for an expert in order to receive expert assistance. *Id.* at 582. In addition, the *Leonard* court asserted that under MCL 775.15, the defendant must show he could not "safely proceed to a trial" without the expert. *Id.* While the court asserted this was "consistent with the majority of courts," it did not cite any authorities other than MCL 775.15 and *Jacobsen*. *Id.*

Then, the *Leonard* court concluded that the trial court failed to engage in a prejudice/fundamental fairness inquiry. *Id.* at 582-583. Conducting this analysis itself, the Court of Appeals opined that the defendant could not establish prejudice because his request for an expert was untimely and defense counsel never filed a formal motion or made a particularized showing of need. *Id.* at 584-585.

Several years later, the United States District Court for the Western District of Michigan granted habeas relief to Mr. Leonard, concluding his defense counsel was ineffective for failing to timely move for a DNA expert. *Leonard v Michigan*, 256 F Supp 2d 723 (WD Mich 2003). The District Court concluded that prejudice resulted in part from counsel's subsequent failure to effectively cross examine the state's experts.

In the present case, the Court of Appeals drew heavily from *Leonard* to conclude that Mr. Kennedy was not entitled to a DNA expert to prepare for trial. The Court of Appeals majority failed to acknowledge the subsequent history of that decision, which calls into question the continuing validity of that decision and its application to this case.

This Court most recently addressed indigent defendants' right to expert assistance almost 15 years ago in *Tanner*, which took Michigan further down the erroneous, unconstitutional path. Again, this Court's decision in *Tanner* is devoid of any constitutional analysis, as it relied on MCL 775.15 and *Jacobsen* when reviewing the claim. *Tanner,* 469 Mich at 442-443. In *Tanner*, the defense sought an expert to help counsel understand the DNA and serology evidence and possibly to testify at trial. *Id.* at 440-441. The trial court denied the request after the prosecution argued there was no need for the defense to have expert assistance because the DNA and serology evidence tended to exonerate the defendant. *Id.* This Court affirmed that decision, concluding that the DNA evidence was exculpatory, so the defense could not establish a nexus between the facts of the case and the need for expert assistance. *Id.* at 443.

The *Tanner* Court also concluded that the asserted need to consult a serology expert was too speculative. *Id.* at 443-444. This was because "the defendant did not establish that an expert would offer *testimony* that would 'likely benefit the defense,' as required by the statute." *Id.*, citing *Jacobsen,* 448 at Mich 641 (emphasis added). The Court stated:

> At best, defendant has raised only the *mere possibility* that the appointment of a DNA and serology expert might have provided some unidentified assistance to the defense. This falls short of satisfying defendant's burden of showing that *she could not safely proceed to trial without such expert assistance.*

Id. at 444 (emphasis added). After many years, this very aspect of *Tanner* is under review by the Sixth Circuit Court of Appeals; its decision in the case is currently pending.[8]

[8] An audio recording of the recent oral argument in the Sixth Circuit is available on the court's website at: http://www.opn.ca6.uscourts.gov/internet/court_audio/aud2.php?link=recent/05-04-2017%20-%20Thursday/15-1691%20Hattie%20Tanner%20v%20Joan%20Yukins.mp3&name=15-1691%20Hattie%20Tanner%20v%20Joan%20Yukins (accessed 7/26/17).

Thus, Michigan's jurisprudence has come to require a defendant to show that an expert would offer *testimony* that would likely benefit the defense before and in order for the state to provide any funds for expert assistance.

a. The misapplication of MCL 775.15 in lieu of the constitutional standard established in *Ake* has resulted in an artificially inflated burden on defendants seeking expert assistance and unconstitutional limits on the range of available assistance.

The United States Supreme Court has established, and since affirmed, that a defendant is entitled to state funds to secure expert assistance in some circumstances. *Ake,* 470 US at 83; *McWilliams*, 137 S Ct at 1798. In contrast with the flawed test our state has constructed based on MCL 775.15, a defendant need only show that (a) he is an indigent defendant; (b) scientific evidence is relevant to the punishment he might suffer; and (c) the scientific evidence relates to a contested element. *McWilliams,* 137 S Ct at 1798 (citations and quotations omitted).

Once those factors are established, the defense is entitled to access to an expert sufficiently independent of the state to provide:

(1) An independent examination of the evidence;

(2) Evaluation of the defense;

(3) Preparation of the defense; and

(4) Presentation of the defense.

Id. at 1801 (citations and quotations omitted). The question of whether a defendant is entitled to access expert assistance at state expense is a constitutional one that is properly analyzed using the *Mathews* three-factor balancing test. *Ake*, 470 US at 76-79.

In contrast, MCL 775.15 only provides the defense access to expert assistance when the judge is satisfied that the defendant cannot "safely proceed to a trial" without the expert's *testimony*. *Tanner,* 469 Mich at 443-444, citing *Jacobsen,* 448 at Mich 641. Further, even in a case where the

primary evidence identifying the defendant was based in serology, a defendant's assertion that expert assistance was necessary for defense counsel to interpret and understand the evidence was deemed "too speculative." *Tanner*, 469 Mich at 444. The *Tanner* court's application of this rule to the facts presented in that case heightened defendants' burden beyond the constitutional standard established in *Ake*.

As noted in the *Tanner* dissent, Michigan courts have created an unworkable rule with an impossible standard:

> If counsel fully understands the prosecution's scientific evidence, there would be no need for an expert to explain it. If, as here, counsel is not an expert in certain scientific matters, the majority seems to require counsel to petition for funds for an expert using an expert's grasp of the subject matter.

Tanner, 469 Mich at 446, dissenting opinion of Justice Kelly. Because our state courts have developed a standard that turns on whether the defendant can proceed safely to trial without the expert's testimony, defendants must go above and beyond the requirements of *Ake* to access *any* expert assistance. The result is a system that presumes defense counsel will be able to either understand complex scientific issues well enough on his own to specifically articulate the need for an expert at trial, or have unfettered, free access to an expert to gain that understanding. This system places an unreasonable and often impossible burden on indigent defendants and their court appointed counsel.[9]

While it is clear that *Ake* permits states to require some showing to receive funds for expert assistance under *Ake*,[10] that requirement cannot serve as an end-run around providing expert

[9] This is especially so given the already existing concerns over the funding of indigent defense in Michigan. See, e.g. *A Race to the Bottom: Executive Summary,* evaluating indigent defense systems in Michigan, available at: http://www.mynlada.org/michigan/michigan_report_execsum.pdf (accessed 7/26/17).

[10] For example, when a defendant made "no showing" as to the reasonableness of his request for the appointment of three different experts at state expense, the Supreme Court concluded there was no due process violation. *Caldwell,* 472 US at 323 FN 1.

assistance at all. The manner in which Michigan courts have applied the particularized showing requirement based on the ill-fitting language of MCL 775.15 has done just that.

For example, in this case the Court of Appeals applied *Tanner* to conclude that Mr. Kennedy failed to make the necessary showing to obtain access to expert assistance:

> Because neither the defendant nor the dissent identify any specific concerns regarding the DNA evidence in this particular case or provide any indication that the DNA evidence was flawed—and, instead, only articulate generalized concerns regarding the complex, scientific nature of the evidence—there is no basis for us to conclude that the trial court's decision constituted an abuse of discretion.

Appendix C. This analysis stands in stark contrast to the Supreme Court's recognition that expert assistance can play a pivotal role in defense counsel's ability to effectively cross-examine the state's experts. It suggests Mr. Kennedy would only be entitled to expert assistance if he could show that there was an expert prepared to contradict the testimony of the state's experts at trial. But Mr. Kennedy would need funds to consult an expert to even find out whether the desired expert would be able to give contradictory testimony.

In other words, the defendant cannot have funds for expert assistance, unless he can prove the expert would provide testimony beneficial to the defense, which he cannot do without expert assistance. Thus, the *Tanner* standard holds defendants to an impossible and unconstitutional standard. Furthermore, the *Tanner* standard cannot be reconciled with defense counsel's need to consult experts in order to understand the science and prepare a defense as necessary to provide effective assistance of counsel. See *Hinton,* 134 S Ct at 1090*, Ackley*, 497 Mich at 389.

Further lost on Michigan courts is the full scope of assistance that experts can and should provide indigent defendants. Compare *McWilliams*, 137 S Ct at 1801. Expert assistance in modern trials, which often involve forensic or scientific evidence, is not limited to offering testimony in court. This Court and the United States Supreme Court have both recognized the significant value an expert can add to the defense team by helping defense counsel better understand the science

involved in a case and developing a strategy for challenging that evidence at trial, whether it be by testimony or effective cross-examination of the state's experts. See *Hinton,* 134 S Ct at 1090*, Ackley*, 497 Mich at 389.

In short, reliance on MCL 775.15 instead of *Ake* and its progeny has left Michigan courts to analyze defendants' claims related to access to experts untethered from the necessary constitutional considerations. Instead of weighing the competing interests of the public in accurate convictions against the state's interest in conserving money, Michigan courts have required defendants to prove that expert testimony will benefit the defense before they even get the funds necessary to consult the expert. Meanwhile, the state has access to countless experts in nearly all the forensic sciences and gets to pick and choose which scientific or forensic evidence it wants to present in a particular case. The result is a criminal justice system in which indigent defendants are rarely, if ever, provided with the "raw materials integral of the building of an effective defense," *Ake,* 470 at 76-77, and an adversarial system in which scientific or forensic evidence presented by the state goes unchallenged.

b. The misapplication of MCL 775.15 in lieu of the constitutional standard established in *Ake* subjected defendants to an artificially inflated standard of harmless error review on appeal.

The beneficiary of preserved constitutional error must establish the error was harmless beyond a reasonable doubt. *Anderson*, 446 Mich at 405-406. In contrast, when the error is not constitutional, the defendant carries the burden of establishing a miscarriage of justice. *Lukity,* 460 Mich at 495-496. Thus, when defendants assert error on appeal related to their right to access expert assistance, whether the claim is constitutional in nature determines what, if anything, a defendant must show on appeal to establish harm.

In Michigan, these claims are generally reviewed only under MCL 775.15, meaning defendants are often held to the *Lukity* standard to establish entitlement to relief on appeal. In

recent years, even when defendants have raised this issue on constitutional grounds, they have still been required to affirmatively prove the error affected the outcome. See *People v Webb,* 493 Mich 904; 823 NW2d 282 (2012).

In *Webb*, this Court agreed with the Court of Appeals' conclusions that the defendant was entitled to funds to retain a DNA expert and was thus denied the opportunity to present a defense, but reversed the Court of Appeals decision to vacate the defendant's convictions on that basis. *Id.* Instead of requiring the state to prove the error was harmless beyond a reasonable doubt on the existing record, this Court required the defendant to expand the record and affirmatively show harm, stating:

> [T]he error in denying funds may have been harmless and at this point in the proceedings, it would be premature to vacate the defendant's convictions before the results of independent DNA testing are known.

Id. This Court required the trial court to provide funds for post-conviction independent testing and required the defendant to prove harm based on those results before he could obtain a new trial.

In contrast, harmless error review for preserved constitutional issues is limited to the existing record and the state bears the burden of establishing the error was harmless. "[T]o safeguard the jury trial guarantee, a reviewing court must '*conduct a thorough examination of the record*' in order to evaluate whether it is clear, beyond a reasonable doubt, that the jury verdict would have been the same absent the error." *People v Shepherd*, 427 Mich 343, 348; 697 NW2d 144 (2005), citing *Neder v United States*, 527 US 1, 19; 119 S Ct 1827 (1999) (emphasis added). "The Court has the power *to review the record* de novo in order to determine an error's harmlessness. In so doing, it must be determined whether the State has met its burden of demonstrating that the" error "did not contribute to [defendant's] conviction." *Arizona v Fulminante*, 499 US 279, 295–296; 111 S Ct 1246 (1991) (citations omitted).

The remedy of remand and expansion of the record is also erroneous because it assumes that the only way that an independent DNA expert could alter the outcome of a trial is in

conducting independent testing that produces different results. Of course, the defense may choose to have its expert conduct independent testing; but the defense may also use the expert to help defense counsel craft a more probing cross-examination of the state's expert(s) than was possible without expert assistance, e.g., about the possibility of cross-contamination or the significance of being the major donor to a mixture (or other factors beyond the knowledge of undersigned counsel, who like trial defense counsel, is not a DNA expert).

Reliance on MCL 775.15 instead of *Ake* and its progeny has left Michigan courts to treat instances where a defendant has been denied access to expert assistance as nonconstitutional error. As a result, defendants have been held to an improperly inflated burden on appeal, when the burden should rest squarely with the state and be limited to the existing record. In addition, the remedy of remanding for the defendant to affirmatively prove that testing by an independent expert would yield different results effectively limits the range of possible assistance an expert can and should provide under *Ake* in the same unconstitutional manner discussed above in section (B)(3)(a).

c. This Court should issue an opinion clarifying that defendants' requests for expert assistance must be reviewed under *Ake* and that such assistance is not limited to providing testimony at trial.

As discussed above, Michigan's jurisprudence has strayed far from the constitutional requirements established in *Ake*. The practice of reviewing indigent defendants' requests for expert assistance under MCL 775.15 and forgoing the constitutional analysis altogether is widespread in Michigan. There is tremendous need for this Court to grant leave to appeal and/or issue an opinion clarifying that such requests implicate the *Mathews* three-factor due process test. Equally important is the need for this Court to clarify, consistent with *McWilliams*, that the range of assistance an expert might provide is not limited to testimony, but includes evaluating and explaining the evidence, as well as preparing the defense. *McWilliams*, 137 S Ct at 1800, citing *Ake,* 470 US at 83. Finally, this

Court should clarify the showing a defendant must make in the trial court to be entitled to expert assistance.

Ake and the Supreme Court decision in *Caldwell*, taken together, allow states to require some specific showing as to a defendant's need for expert assistance. *Caldwell,* 472 US at 323 FN 1. In the years since *Ake* and *Caldwell* were decided, states have developed different standards.

At least one state automatically grants defendants access to expert assistance where the state presents scientific evidence. See *Polk v State*, 612 So 2d 381, 393 (Miss 1992) ("It is also imperative that no defendant have such evidence admitted against him without the benefit of an independent expert witness to evaluate the data on his behalf."), reversed on other grounds by *Mississippi Transp Com'n v McLemore*, 863 So2d 31 (Miss 2003).

Another state grants defendants access to expert assistance, so long as the defense offers "more than 'undeveloped assertions that the requested assistance would be beneficial.'" *Dubose v State*, 662 So 2d 1189, 1199 (Ala 1995), citing *Caldwell*, 472 US at 324 FN 1.

The majority of states have adopted a reasonable probability standard. See *Moore v Kemp*, 809 F2d 702 (CA 11 1987); *Moore*, 390 Md at 363-364. The Eleventh Circuit Court of Appeals discussed the standard in detail:

> [A] defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial. Thus, if a defendant wants an expert to assist his attorney in confronting the prosecution's proof-by preparing counsel to cross-examine the prosecution's experts or by providing rebuttal testimony-he must inform the court of the nature of the prosecution's case and how the requested expert would be useful. At the very least, he must inform the trial court about the nature of the crime and the evidence linking him to the crime. By the same token, if the defendant desires the appointment of an expert so that he can present an affirmative defense, such as insanity, he must demonstrate a substantial basis for the defense, as the defendant did in *Ake*. In each instance, the defendant's showing must also include a specific description of the expert or experts desired; without this basic information, the court would be unable to grant the defendant's

> motion, because the court would not know what type of expert was needed. In addition, the defendant should inform the court why the particular expert is necessary. We recognize that defense counsel may be unfamiliar with the specific scientific theories implicated in a case and therefore cannot be expected to provide the court with a detailed analysis of the assistance an appointed expert might provide. We do believe, however, that defense counsel is obligated to inform himself about the specific scientific area in question and to provide the court with as much information as possible concerning the usefulness of the requested expert to the defense's case.

Moore, 809 F2d at 712.

Each of these standards is consistent with the right established in *Ake* and is considerably lower than the standard applied by Michigan courts in reliance on MCL 775.15. The reasonable probability standard in particular requires the defense to show that their request is reasonable and likely to benefit the defense, but is flexible and recognizes the defense's limited ability to make a specific showing in the absence of the expert assistance sought. This Court should expressly adopt one of the above three standards in order to provide clarity to Michigan courts and practitioners and to bring Michigan jurisprudence in line with what the constitution demands.

C. Under *Ake*, the trial court violated Mr. Kennedy's due process rights by denying his request for funds to consult a DNA expert because the state made DNA evidence a central part of its case.

In this case, the state presented two experts about DNA testing of 20-year-old evidence swabs. TT, 7/14/14 AM 10; TT, 7/15/14 4-95. The experts testified about two distinct types of DNA testing, one of which involved the interpretation of a mixture of DNA contributed by three or more male donors. TT, 7/15/14 80-82. The DNA evidence and expert testimony were a central part of the state's case. See, e.g. TT, 7/14/14 AM 10. Defense counsel filed a written motion explaining this was the case and that he was not able to understand or effectively challenge the DNA evidence without expert assistance. Appendix A.

Under *Ake*, Mr. Kennedy was entitled to independent expert assistance to prepare a defense. *Ake,* 470 US at 70. It is undisputed that Mr. Kennedy was an indigent criminal defendant. In a case where the only disputed element was identity, the state chose to make DNA evidence, and Y-STR testing in particular, a central part of its case. See, e.g. TT, 7/14/14 AM 10. The state urged the crime lab to perform Y-STR testing outside their standard protocols. TT, 7/15/14 51-53; Appendix B. The prosecutor told the jury from the beginning of the trial that the "wonders of science" proved Mr. Kennedy was guilty of murder. TT, 7/14/14 AM 10. She then argued in closing that the state expert's conclusion that Mr. Kennedy was a major donor to a DNA mixture under the decedent's fingernails meant that he was the last person with her, even though the expert never said that was the case. Compare TT, 7/15/14 85, 93-94 and TT, 7/16/14 10, 21-22. This was especially problematic where there was evidence another man, Big Mike, was seen with the decedent shortly before her death and said he killed her shortly after her death. TT, 7/14/14 AM 56-57, 60, 62-63, 84, 99-100.

These facts establish Mr. Kennedy's entitlement to access an independent expert. See *McWilliams,* 137 S Ct 1798. Without expert assistance, his attorney was ill-equipped to understand and challenge the scientific evidence presented by the state at trial. More importantly, because he did not understand the science involved, defense counsel was doomed to fail in any effort to cross-examine the state's experts.

Because Mr. Kennedy raised this issue on constitutional grounds in the trial court, the Court of Appeals reversibly erred when it failed to engage in the proper constitutional analysis. After applying MCL 775.15 and *Tanner* to conclude Mr. Kennedy did not have the right to expert assistance, it simply asserted:

> Likewise, we find no basis for concluding that defendant's constitutional rights were violated on that basis and because defendant had an adequate opportunity to present his arguments in

> the adversarial system, particularly through counsel's thorough cross-examination of the state's witnesses.

Appendix C p 7. The court's purported constitutional analysis is directly contrary to the Supreme Court's recent reaffirmation that the assistance an independent expert might provide includes helping counsel prepare a defense and, specifically, preparing to cross-examine the state's experts. Compare *McWilliams*, 137 S Ct at 1800.

When the *Mathews* balancing test is applied here, the result is the same reached by the Supreme Court in *Ake,* 470 US at 78-80:

(1) The private interest in the accuracy of criminal proceedings, including the one below, is "almost uniquely compelling";

(2) The government's interest in saving money is "not substantial"; and

(3) The area of expertise at issue, DNA analysis, has come to play a "pivotal role" in criminal prosecutions and access to an independent DNA expert "may well be crucial to the defendant's ability to marshal his defense."

As a result, the trial court's refusal to grant Mr. Kennedy's request for funds to consult a DNA expert violated his constitutional rights to due process, a fair trial, and to present a defense.

Sure enough, without expert assistance defense counsel struggled to effectively cross-examine the state's witnesses. He used cross-examination to have them re-explain testing procedures the experts had already explained during direct examination, demonstrating his lack of mastery or even basic understanding of the subject. See, e.g. TT, 7/15/14 60-62. Defense counsel repeatedly asked the experts to affirm that he was using the proper terminology or to re-explain its meaning. TT, 7/15/14 85, 86-87, 89-90. During his questioning of the experts, defense counsel conflated the two distinct types of DNA testing involved in this case, Y-STR and STR. TT, 7/15/14 69. Even though he did attempt to cross-examine the state's experts regarding the NAS report, he was ill-prepared and unable to overcome the state's foundational objections. TT, 7/15/14 57-58. For these reasons, the state cannot meet its burden of proving the error harmless beyond a reasonable doubt.

Without his own expert, Mr. Kennedy was, in effect, denied the opportunity to challenge the state's evidence. If the defense is not entitled to the assistance of a DNA expert in a case relying almost entirely upon DNA evidence, "access to justice" loses its meaning. *Ake*, 470 Mich at 76-77. The danger is even greater in cold cases, such as this, where defendants have little chance to reconstruct where they were and what they were doing 20 years prior or to build a case against any alternative suspects in order to present any sort of affirmative defense.

For all of these reasons, this Court should reverse the decisions below and grant Mr. Kennedy a new trial.

Request for Relief

Defendant-Appellant Johnny Ray Kennedy asks this Honorable Court to grant leave to appeal and/or issue an opinion clarifying that *Ake* controls the analysis of defendants' requests for expert assistance, reverse the decisions below, and grant a new trial.

Respectfully submitted,
State Appellate Defender Office

BY: /s/ Erin Van Campen
_____

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Date: July 31, 2017

Index of Appendices

Appendix A

STATE OF MICHIGAN
WAYNE COUNTY CIRCUIT COURT
CRIMINAL DIVISION

People of the State of Michigan

Plaintiff

Vs.

Case no. 14-001748-01-FC
The Honorable Craig Strong

Johnny Ray Kennedy

Defendant

/

APA Suzette Samuels (P-51796)
Wayne County Prosecutor
1441 St. Antoine, 11th Floor
Detroit, Michigan 48226
(313) 224-6429

John J. Holler III (P-43344)
Counsel for the Defendant
312 Sycamore
Wyandotte, Michigan 48192
(734) 282-6486

PRAECIPE FOR MOTION

To the clerk of the Court: Please place the within **Defendant's Motion for Appointment of Brian Zubel, Esq., as Expert to Assist the Defense** on the docket of the Honorable Craig Strong to be heard at **9:00 AM** on **April 4th, 2014** or as soon thereafter as counsel may be heard.

March 26, 2014

John J. Holler III (P-43344)
Counsel for the Defendant

STATE OF MICHIGAN
WAYNE COUNTY CIRCUIT COURT
CRIMINAL DIVISION

People of the State of Michigan

Plaintiff

Vs.

Case no. 14-001748-01-FC
The Honorable Craig Strong

Johnny Ray Kennedy

Defendant

_____/

APA Suzette Samuels (P-51796)
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Detroit, Michigan 48226
(313) 224-6429

John J. Holler III (P-43344)
Counsel for the Defendant
312 Sycamore
Wyandotte, Michigan 48192
(734) 282-6486

DEFENDANT'S MOTION FOR APPOINTMENT OF BRIAN ZUBEL, ESQ., AS EXPERT TO ASSIST THE DEFENSE

Now comes the Defendant, by and through counsel, and states for his motion as follows;

1. That in the present case, the defendant is charged with murder in the first degree.

2. That the decedent victim is one Tanya Harris, whose body was found in an abandoned building in November 1993.

3. That the only evidence against the defendant, who is an inmate in the Michigan Department of Corrections, is a test of DNA material performed by one Amy Altesleben, a forensic scientist employed by the Michigan State Police.

4. That, a prosecution based largely or entirely upon the presentation of identification evidence based upon DNA poses an especially technical and complex range of issues for defense counsel, as the essence of the prosecutions' case is the presentation of a report from a qualified

technician or scientist. That report is conclusory and counsel who would render constitutionally effective assistance to his client and zealously confront the witnesses and evidence called in the prosecution's case in chief, must be educated and schooled to no small extent in the science and accepted protocols of DNA extraction, preservation, testing, as well as dangers of contamination and the steps and measures taken to document a particular test, and to maintain the proper calibration of testing equipment, all just to some of the areas in which counsel must be prepared to cross-examine.

5. That counsel seeks an order of the court to appoint as an expert in what may be called "DNA litigation" one Brian Zubel of Fenton, Michigan.

6. Mr. Zubel is an attorney licensed to practice in Michigan, who has been a member of the American Academy of Forensic Sciences since 2008. He has presented DNA evidence as a prosecuting attorney in Oakland, Berrien, and Genesee counties and has litigated in similar fashion as an assistant attorney general of the state of Michigan in the case of ***People v. Unger,*** **278 Mich App 210 (2008).**

7. That Mr. Zubel's Curriculum Vitae is attached to this motion, as well as a scholarly article from the September 2013 issue of the Criminal Law Section newsletter.

8. That in Wayne County Circuit Court, Mr. Zubel has been recognized as an expert by the Honorable Annette Jurkewicz Berry and by the Honorable Vonda Evans.

9. That, without the active assistance of a learned expert, counsel will not be able to confront the witnesses and to shed light on any questionable issues that may have occurred during the lengthy storage and testing procedures.

10. That Counsel makes this request under the authority of the 6th Amendment of the U.S. Constitution.

WHEREFORE, the defendant requests that this honorable court appoint attorney Brian Zubel as an expert to aid the defense.

March 26, 2014

John J. Holler III (P-43344)
Counsel for the Defendant

Curriculum Vitae of Brian Zubel, Esq.,

CURRICULUM VITAE – BRIAN ZUBEL

CONTACT INFORMATION

PO Box 70, Fenton, MI 48430 248 459 0172 fax 248 846 5367
bzubel@comcast.net www.brianzubel.com

EDUCATION

University of Michigan Law School, 1984, JD
University of Michigan, 1980, BS Biology

ADMISSION TO PRACTICE

US District Court, Eastern District, 1989
State Bar of Michigan, 1984

ADMISSION TO AMERICAN ACADEMY OF FORENSIC SCIENCES

February, 2008

PROFESSIONAL EXPERIENCE

June 2006 – Present
Forensic Science Legal Consultant/Private Practitioner
Brian Zubel PLC
Fenton, Michigan

November 1995 – March 2006
Training Attorney/Special Prosecutor/Assistant Attorney General
Michigan Department of Attorney General
Lansing, Michigan

Developed and conducted training for Michigan prosecutors in all aspects of advocacy and forensic science; specially appointed to litigate forensic science issues in criminal cases throughout the state.

October 1984-May 1991; July 1992-November 1995
Senior Trial Attorney
Oakland County Prosecutors Office
Pontiac, Michigan

Experience includes over two hundred trials, including Michigan's leading DNA precedent, ***People v Adams***, 195 Mich App 267 (1992) which held DNA identification and Product Rule results admissible.

SPECIAL APPOINTMENTS

July 2007	Assistant Examiner, Michigan Judicial Tenure Commission: Specially appointed to prosecute the ***Formal Complaint against Hon. Beverley Nettles-Nickerson*** - FC 81 (Perjury, Subornation of False Statements, Fabrication of Evidence, Abuse of Authority and Position, etc.) On June 13, 2008, the Michigan Supreme Court affirmed that Respondent had committed six of the counts and ordered her removed from office.
June 2007 (re-appointed)	Assistant Prosecutor, Berrien County: ***People v Spagnola*** (Murder). Appointed to litigate forensic science issues at evidentiary hearing regarding the defense motion for new trial; conducted the cross examination of four defense experts in Forensic STR DNA profiling, Population Genetics/Statistics, Forensic Soil Identification and the adequacy of Forensic Science Advocacy under the *Ginther* standard; in a 54 page Opinion the Court denied the defense motion.
January 2006	Assistant Attorney General, State of Michigan: ***People v Unger*** (Murder) Appointed to develop a *Daubert* evidentiary record to overturn a District Court ruling excluding the expert testimony of Forensic Pathologist /Neuropathologist Ljubisa Dragovic, MD. Recruited experts in Emergency Medicine and Neuropathology and directed additional sectioning of tissues to buttress Dragovic's opinion. The District Court ruling was reversed and defendant was convicted of first-degree murder. Upheld by the Court of Appeals; 278 Mich App 210 (2008).
April 2005	Assistant Prosecutor, Oakland County: ***People v Hirmuz*** (Sexual Assault) Appointed to challenge Thomas Bereza as an expert in police interviewing technique; Bereza was withdrawn as a witness following cross-examination at the *Daubert* hearing.
November 2004	Assistant Prosecutor, Berrien County: ***People v Spagnola*** (Murder) Appointed to challenge Dr. Dan Krane's reprocessing of DNA data using non-validated thresholds. Following cross-examination and presentation of rebuttal witness Dr. Bruce McCord, Krane reversed himself on the issue: *J Forensic Sci*, January 2007, Vol. 52, No. 1, 97-101.
February 2004	Special Assistant Prosecutor, Genesee County: ***People v Warshaw*** (Murder); ***People v Mayes*** (Sexual Assault) Appointed to challenge Dr. Theodore Kessis as an expert in Forensic DNA Typing; Kessis was ordered excluded in *Mayes*, and voluntarily withdrew as a witness in *Warshaw*; upheld January 31, 2006, C/A No. 257589.
August 2000	Assistant Prosecutor, Kent County: ***People v Kopp, Rogers, Mileski and Rivera*** (Murder): ***People v Phillips*** (Sexual Assault); Special Prosecutor, Lake County: ***People v Cavin*** (Murder) Appointed to defend STR DNA in the face of *Davis-Frye* challenge; all three judges upheld admissibility.

DNA CURRICULUM DEVELOPMENT

1. President's DNA Initiative: Law Enforcement Training Development Work Group, Washington, DC, July 2003.

2. American Prosecutors Research Institute (APRI): DNA Curriculum Development Advisory Group, Alexandria, Virginia, January 2006-2007.

INVITED LECTURES

1. "Davis-Frye Admissibility of DNA Fingerprinting" Presented at the Michigan Trial Prosecutors' Training Retreat, Bellaire, Michigan, April 1989

2. "Presentation of DNA Identification Evidence" Presented at the Prosecution Problems Seminar of the Prosecuting Attorneys Coordinating Council, East Lansing, Michigan, December 1989

3. "Laying the Scientific Reliability Predicate Foundation for Admission of DNA/Presentation of DNA Identification in Court" Presented at the Statewide Association of Prosecutors of Utah Spring Conference, Ogden, Utah, April 1990

4. "DNA Fingerprinting; RFLP and PCR Update" Presented to the Oakland Criminal Investigators Association, Royal Oak, Michigan, January 1991

5. "The Interface between Law and the New Medical Technologies" Presented to the Medical Scientist Training Program of the University of Michigan Medical School, Ann Arbor, Michigan, April 1992

6. "DNA Evidence: Capabilities and Limitations" Presented at the request of the University of Michigan Genome Ethics Committee to the Washtenaw County Bar Association, Ann Arbor, Michigan, October 1994

7. "DNA as an Investigative Tool" Presented to the Michigan-Ontario Identification Association, Troy, Michigan, May 1995

8. "Defense Challenges to DNA Evidence" Presented to the staff of the Michigan State Police DNA Laboratory, May-June, 1997.

9. "Basics of Criminal Prosecution" Presented to the staff of the Michigan Attorney Grievance Commission, Detroit, Michigan, 1997.

10. "FOIA and Privacy Issues" Presented at the Michigan Association of Medical Examiners Annual Conference, Bay City, Michigan, November 1997.

11. "Scientific Issues in Sexual Assault" Presented at the Michigan Coalition Against Domestic and Sexual Violence Statewide Sexual Assault Conference, Lansing, Michigan,

September 1998.

12. "Evidence: Direct- and Cross-Examination of Expert Witnesses" Presented at the Graduate Forensic Science Program, Michigan State University, East Lansing, April 1999.

13. Prosecution Closing Argument Demonstration presented at the National District Attorneys Association National Advocacy Center, Applied Trial Advocacy Program, Columbia, South Carolina, May 1999.

14. "Trial Preparation and Testimony in Court" Presented at the PAAM/Child Abuse Training Services Basic Child Abuse Training Seminar, Mount Pleasant, Michigan, August 1999.

15. "Expert Witnesses: Evidence and Advocacy" Presented at the Michigan Association of Medical Examiners Annual Conference, Auburn Hills, Michigan, October 1999.

16. "Evidence: Direct- and Cross-Examination of Expert Witnesses" Presented at the Graduate Forensic Science Program, Michigan State University, East Lansing, April 2000.

17. Prosecution Closing Argument Demonstration presented at the National District Attorneys Association National Advocacy Center, Trial Advocacy I Program, Columbia, South Carolina, July 2000.

18. "Post Conviction DNA Testing" Presented at the Prosecuting Attorneys Association of Michigan Annual Conference, Mackinac Island, Michigan, August 2000.

19. "DNA Issues in Sexual Assault" Presented at the Michigan Coalition Against Domestic and Sexual Violence Statewide Sexual Assault Conference, Midland, Michigan, August 2000.

20. "Legal Issues in DNA Evidence" Presented at the Oakland County Medical Examiners Homicide Investigator Seminar, Pontiac, Michigan, October 2000.

21. "Introduction to STR PCR DNA" Presented to the Michigan Bar Association Mid-Winter Training Conference, Bellaire, Michigan, February 2001.

22. "Introduction to Analytical Advocacy" Presented at the National District Attorneys Association National Advocacy Center, Trial Advocacy I Program, Columbia, South Carolina, March 2001.

23. "Issues in DNA Profiling" Presented at the Michigan Coalition Against Domestic and Sexual Violence Statewide Sexual Assault Conference, Lansing, Michigan, April 2001.

24. "Forensic DNA Profiling and the Role of the Expert Witness" Presented at the Graduate Criminal Justice Program, Michigan State University, East Lansing, April 2001.

25. "Direct- and Cross-Examination of DNA Expert Witnesses" Presented at the Graduate Forensic Science Program, Michigan State University, East Lansing, April 2001.

26. "Legal Admissibility of Forensic DNA Profiling" Presented at the Graduate Forensic Science Program, Michigan State University, East Lansing, April 2001.

27. "Prosecutor Ethics" Presented at the National District Attorneys Association National Advocacy Center, Trial Advocacy I Program, Columbia, South Carolina, June 2002.

28. "Nonlinear Cross Examination" Presented at the PAAM Traffic Safety Training Programs Cross Examination Skills Seminar, East Lansing, Michigan, January 2004.

29. "Prosecutor Ethics" Presented at the National District Attorneys Association National Advocacy Center, Trial Advocacy I Program, Columbia, South Carolina, March 2004.

30. "Forensic DNA" Presented at the PAAM VAWA Specialized Evidence for Domestic Violence and Sexual Assault Prosecutors Seminar, Traverse City, Michigan, May 2004.

31. "Legal Issues in DNA" Presented at the National Black Prosecutors Association 21st Annual Convention, Detroit, Michigan, July 2004.

32. "DNA Evidence" Presented at the PAAM VAWA/APRI Understanding Sexual Violence; Prosecution of Adult Rape and Sexual Assault Seminar, Lansing, Michigan, August 2004

33. "MRE 702, 703 and the *Daubert* Standard" Presented at the Prosecuting Attorneys Association of Michigan Annual Conference, Mackinac Island, Michigan, August 2004.

34. "Testimony-for-Hire and the *Daubert* Standard" Presented at the Advanced Topics in Criminal Practice Seminar, Wayne State University Law School, Detroit, Michigan February 2005.

35. "DNA and *Daubert*" Presented at the Midwestern Association of Forensic Scientists (MAFS) Spring Workshop, Lansing, Michigan, April 2005.

36. "DNA, Testimony-for-Hire and the *Daubert* Standard" Presented at the American Prosecutors Research Institute (APRI) Advanced DNA Seminar, Nashville, Tennessee, June 2005.

37. "*Daubert* Challenge Update: DNA Cold-Hit Statistics" Presented at the Michigan State Police Biology/DNA/CODIS Unit Meeting, Lansing, Michigan, October 2005.

38. "DNA: an Overview" Presented at the Prosecuting Federal Sexual Assault Cases Seminar, Executive Office for United States Attorneys, USDOJ, Columbia, South Carolina, January 2006.

39. "Mixed DNA Samples: Interpretation, Statistics, and Presentation" Presented at the American Prosecutors Research Institute (APRI) True Identity: DNA Fingerprinting in the Courtroom Seminar, Chicago, Illinois, April 2006.

40. "Mixed DNA Samples" and "Dealing with Defense Experts" Presented at the National

District Attorneys Association/National College of District Attorneys/National Advocacy Center/True Identity: DNA Fingerprinting in the Courtroom Course, Columbia, South Carolina, June 2006.

41. "Whither Reprocessing of STR Electronic Data?" Presented at the Midwest Association of Forensic Scientists (MAFS) Annual Conference, Indianapolis, Indiana, October 2006.

42. "Introduction to DNA: STR, Lab Reports, E-grams and Statistics" and "DNA Legal Issues and Trial Tactics" Brian Zubel PLC's DNA and the Law Seminar, Frankenmuth, Michigan, May 2007

43. "Current DNA Issues in Cold Hit Cases" Presented at the Michigan State Bar Criminal Law Section Spring/Summer Conference, Ann Arbor, Michigan, June 2008

44. "Expert Witnesses: Lawyers' Ethical Obligations under the Rules of Professional Conduct" Presented at the American Academy of Forensic Sciences 62nd Annual Scientific Meeting, Seattle, Washington, February 2010

45. "DNA and the Law – Interpretational Issues" Presented at the Prosecuting Attorneys' Council of Georgia Summer Capital Litigation Program, Jekyll Island, Georgia, July 2011

46. "Crime Lab Malfeasance – Evidentiary and Due Process Implications" Presented to the National Lifers of America, Kinross Chapter, Kinross, Michigan, August 2012

47. "Preventing DNA Wrongful Convictions; Legal and Judicial Obligations" Presented at the American Academy of Forensic Sciences 65th Annual Scientific Meeting, Washington D.C., February 2013

WEBCAST PRESENTATIONS

1. Zubel, B, *DNA in the Courtroom – Current Issues*, www.brighttalk.com/webcasts/search/legal, originally webcast on January 27, 2009

2. Zubel, B, Berton, E, *The 2009 Report on the Forensic Sciences from the National Academies – The Wake-Up Call for Criminal Law Practitioners*, www.brighttalk.com/webcasts/search/legal, originally webcast on April 9, 2009

SELECTED PUBLICATIONS

1. Zubel, B, *DNA Evidence in Michigan*, Laches, Oakland County Bar Association 296: 8-9, September 1990

2. Zubel, B, *Hair as Forensic Evidence: A Case Study*, Laches, Oakland County Bar Association, 308: 10-11, September 1991

3. Zubel, B, *Intellectual Contraband*, Laches, Oakland County Bar Association, 318: 21-22, July 1992

4. Zubel, B, *The Silence of the Labs*, Michigan State Appellate Defender Office Criminal Defense Newsletter, Volume 31, Number 11, August 2008

5. Zubel, B, *Firearms Identification Reconsidered*, Michigan State Appellate Defender Office Criminal Defense Newsletter, Volume 31, Number 12; Volume 32, Number 1, September-October 2008

6. Zubel, B, *The Detroit Police Department and Crime Lab – The Case for Independent Review and Re-examination of Evidence*, The Criminal Law Section / State Bar of Michigan Newsletter, January 2009

7. Zubel, B, *The 2009 Report from the National Academies – The Wake-Up Call for Criminal Law Practitioners in Michigan*, The Criminal Law Section / State Bar of Michigan Newsletter, May 2009

8. Zubel, B, *Expert Witnesses: Lawyers' Ethical Obligations under the Rules of Professional Conduct*, Proceedings of the American Academy of Forensic Sciences, February 2010

9. Zubel, B, *Preventing DNA Wrongful Convictions; Legal and Judicial Obligations*, Proceedings of the American Academy of Forensic Sciences, February 2013

10. Zubel, B, *Case Study: A DNA False Inclusion*, The Criminal Law Section / State Bar of Michigan Newsletter, September 2013

AWARDS

1. Parents of Murdered Children, Metro Detroit Chapter Humanitarian Award, 1994

2. Parents of Murdered Children, National Organization Father Ken Czillinger Professional Award, 1995

Case Study : A DNA False Inclusion

By Brian Zubel, Esq.,
Criminal Law Section Newsletter
September, 2013

Case Study: A DNA False Inclusion

by

Brian Zubel*

Forensic DNA Typing has been referred to as the "gold standard" among the forensic disciplines. The developmental validation of Forensic DNA is certainly a shining example of science done right, but we must resist the temptation to think of DNA as infallible. As with any human endeavor, things can always go wrong.

In Ionia County, Michigan, in 2009, a homeowner discovered his house had been burglarized and a number of firearms stolen from his gun cabinet. The cabinet had been pried open; a knife from the kitchen was lying at the foot of the cabinet, its blade bent into a curve. Police investigators collected the knife as evidence and submitted it for forensic DNA typing.[1]

The Michigan State Police laboratory was able to obtain a complete male profile across the thirteen FBI-standardized DNA loci from the knife handle.[2] As the police had no profile from their suspect to compare at that time, the unknown male profile was entered into CODIS, part of the FBI-administered national DNA database.[3]

The police had a possible suspect who had been linked to firearms stolen in another burglary in the area, but were unable to locate him for many months.[4] When he was ultimately arrested, they obtained a search warrant for buccal swabs from the man, and submitted these reference samples to the laboratory for DNA analysis and comparison to the profile from the 2009 burglary.

Two DNA analysts were involved in the investigation. The first analyst processed the sample from the knife handle and entered the resulting profile into CODIS. The second analyst processed the known DNA from the arrestee and compared his profile to that obtained from the knife.

...the future is ours, if you can count

Looking at the exact same data, the two analysts reached completely different results. The first analyst concluded the DNA profile from the knife handle was from one person, while the second claimed the DNA was a ***mixture from at least two individuals***:

First Analyst:	Second Analyst:
"The DNA types obtained from [the] knife handle are from an unidentified male."[5]	"The DNA types obtained from [the] knife handle indicate that more than one donor is associated with the sample."[6]

The second analyst went even further and claimed that the arrestee could not be excluded as a possible contributor to this DNA mixture. The data tabulations below show the knife handle profile (as entered into CODIS) and the arrestee's profile in side-by-side comparison. Contrary to the second analyst's report, the profile observed on the knife handle was indeed from a single source. The arrestee could not have been the source of that profile. The profiles simply did not match:

Profiler Plus[7]:

	D3S1358	vWA	FGA	AMELOGENIN	D8S1179	D21S11	D18S51	D5S818	D13S317	D7S820
CODIS entry	15	16, 17	22, 24	X ,Y	14	30.2, 31	16	11	11	10
Arrestee	15	14, 16	22, 25	X, Y	12, 14	30, 30.2	13, 14	11, 12	11	8, 12

COfiler[8]:

	D3S1358	D16S539	AMELOGENIN	TH01	TPOX	CSF1PO	D7S820
CODIS entry	15	12	X, Y	6, 7	8, 11	11	10
Arrestee	15	9, 13	X, Y	7	8	11	8, 12

The second analyst had fashioned his conclusion by looking at only ***some*** of the DNA types observed. In his report, he claimed the arrestee "***can not be excluded as being a donor to the DNA obtained from this evidence at the loci D3S1358, D13S317, TH01, TPOX and CSF1P.***" In order to reach this result, however, it was necessary to ignore all the other data that clearly indicated exclusion.

The first question was what to do about the case. The arrestee had been charged with felonies and was facing preliminary examination. Rather than delay the proceedings by filing an MRE 702/*Daubert* brief, it was decided that the preliminary exam itself could effectively be used to frame the issues for the Court. Both lab analysts would be subpoenaed as defense witnesses. The first analyst's testimony would then be pitted against the other's to develop the absurdity of the government lab's contradictory results.

...relieve the cause, but not the symptom

On the day scheduled for preliminary examination, neither analyst appeared. With the Judge already waiting on the bench, the prosecutor hurried into the courtroom and brought a motion for an order of nolle prosequi.[9]

The arrestee was elated; he had steadfastly maintained his innocence on the charges. But with no longer any cause in controversy, there would be no opportunity to cross-examine the lab's absurd claims. Worse still, the second analyst would go unchecked, perhaps to repeat such errors in other cases.

The second question is what went wrong at the lab. The simplest explanation is that the first analyst followed the lab's protocol while the second did not. But this does not explain how a trained, supervised government DNA analyst came to disregard his lab's interpretational rules and state a false result in his report.

Analyst Bias

The obvious cannot be ignored: the two analysts came from diametrically opposed motivational perspectives. The first analyst developed an unknown male profile and entered it into the CODIS database. The second analyst was presented with a suspect already under arrest and ***a target profile the police were expecting to be matched to the crime***. It should not seem surprising that the first analyst's conclusions excluded the arrestee while the second's did not. Analyst bias exists.

Law enforcement critics of the 2009 NRC Report point to the multiple tiers of review required in forensic casework and suggest they are adequate to address any potential problems. In the Ionia case, the lab already had internal procedures in place for both the technical and administrative review of reports; nevertheless, the contradiction in the reports was not spotted. It was also missed by the investigator who submitted the matter to the prosecutor for a warrant, as well as the prosecutor who issued the charges.

Laboratory technical and administrative reviews are rather less than their titles would imply. Case files that are ready for review are gathered into binders and taken on the road by lab supervisors. The supervisors catch up on their reviews during breaks at court, at lunch, or after hours.

During a court recess several years ago, I was sitting with a DNA lab supervisor while he worked on technical reviews. As he flipped through the sheets of data, I pointed to an anomaly and asked "what's that?" "Oh...good eye," was his response as he went back and noted the piece of anomalous data he had missed.[14] The process of review is not automated; it is a repetitive task completely dependent on human perception and judgment. People get distracted, or tired. Things are missed.

Forensic DNA is not a machine that takes in evidence at one end and automatically prints out a lab report at the other. It is a complex of sensitive biological and analytical chemistry techniques. Multiple levels of exacting human interpretation and review are absolutely essential. As the technologies expand in their capability to detect smaller and smaller quantities of biological material, the accurate interpretation of DNA data assumes ever greater importance.[15]

The hard reality of DNA is that its data is susceptible to a range of interpretation, particularly in the case of DNA mixtures. Studies have demonstrated that simple differences in the interpretational guidelines used by laboratories have an enormous impact on the conclusions claimed in mixture cases[16]

DNA is not the future...it is now

The lawyer who jokes that he can't even spell DNA is not getting his job done. Forensic DNA typing has been used in Michigan since 1988. DNA is no longer limited to murder and sexual assault cases, it is the stuff of even garden-variety burglary prosecutions. Lawyers need to understand DNA.

The criminal law practitioner is not without resources. Dr. John M. Butler is one of the pioneers of current-generation forensic DNA detection methods. He has published a series of authoritative textbooks on forensic DNA. They can be purchased online; the whole suite of books is available for less than $200.

The science of DNA is undeniably sound but, in the hands of mortals, it is not infallible. If wrongful DNA convictions are to be prevented, lab reports cannot be accepted at face value. If Due Process is to have meaning in the scientific age, lawyers and judges must be able to scrutinize the claims made by forensic analysts.

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[1]Michigan Department of State Police, Original Incident Report No. 068-0002065-09(02), June 29, 2009, Tpr. D. Drew, at page 1.
[2]Michigan Department of State Police, Forensic Science Division Laboratory Report No. GR09-4298, January 21, 2010.

In 2009, the National Research Council (NRC) issued a Report to Congress highly critical of much of traditional forensics. The NRC report also recognized that analyst bias was real:

> The best science is conducted in a scientific setting as opposed to a law enforcement setting. Because forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.[10]

The NRC specifically noted:

> Human judgment is subject to many different types of bias, because we unconsciously pick up cues from our environment and factor them in an unstated way into our mental analyses.
>
> ***
>
> Such cognitive biases are not the result of character flaws; instead, they are common features of decision making, and they cannot be willed away. A familiar example is how the common desire to please others (or avoid conflict) can skew one's judgment if coworkers or supervisors suggest they are hoping for, or have reached, a particular outcome.[11]

The pressure placed on lab analysts can be quite heavy-handed. Police investigators regularly contact analysts while testing is being performed. They provide analysts with grotesque, brutal or other details of crimes that they would not otherwise know, or have any legitimate scientific reason to know. Analysts receive information about suspects' prior criminal records, and even the results of other types of forensic testing.

There will always be a danger of bias so long as crime laboratories are an institutional part of the police and prosecution team. The NRC recommended to Congress that studies be conducted to determine the extent the results of forensic analyses are influenced by knowledge regarding the background of the suspect and the investigator's theory of the case.[12] The NRC was emphatic that all public forensic laboratories and facilities should be removed from the administrative control of law enforcement agencies or prosecutors' offices.[13]

"Exculpatory evidence" is not an obscene phrase

Attitudes reflecting bias have even crept into the language used among lab analysts. The term "unprosecutable" is usually reserved to describe a criminal case that cannot go forward because of legal or constitutional obstacles.

At the labs, the term has been used where an analyst has performed "too much" testing, resulting in the discovery of exculpatory evidence. Some analysts are apparently disappointed when the discovery of exculpatory evidence makes the target of a police investigation "unprosecutable." Such thinking is anathema to good science.

[3]Michigan Department of State Police, Supplemental Incident Report No. 068-0002065-09(02), February 4, 2010, Tpr. D. Drew, at page 1.
[4]Michigan Department of State Police, Supplemental Incident Report No. 068-0002065-09(02), October 8, 2009, Tpr. D. Drew, at page 1.
[5]Michigan Department of State Police, Forensic Science Division Laboratory Report No. GR09-4298, January 21, 2010.
[6]Michigan Department of State Police, Forensic Science Division Laboratory Report No. GR09-4298, August 2, 2010, at page 1.
[7]Michigan State Police STR Summary Worksheets: Profiler Plus and COfiler; Laboratory Number GR09-4298, December 20, 2009; Michigan State Police STR Summary Worksheet: Profiler Plus and COfiler; Laboratory Number GR09-4298, August 2, 2010.
[8]Michigan State Police STR Summary Worksheets: Profiler Plus and COfiler; Laboratory Number GR09-4298, December 20, 2009; Michigan State Police STR Summary Worksheet: Profiler Plus and COfiler; Laboratory Number GR09-4298, August 2, 2010.
[9]*People v Robert Secord*, Case No. 10-1889-FY, Hon. Raymond P. Voet, 64-A District Court; the author was specially appointed to assist court-appointed counsel with respect to the DNA issues in the case.
[10]Strengthening Forensic Science in the United States: A Path Forward, at S-17.
[11]*Id.* at 4-9.
[12]*Id.* at Recommendation 5.
[13]*Id.* at Recommendation 4.
[14]*Author's note.*
[15]*Complex Mixtures*, Charlotte J. Word, NIST Mixture Interpretation Webcast, April 12, 2013.
[16]*NIST Mixture Interpretation Interlaboratory Study 2005 (MIX05)*, John M. Butler and Margaret C. Kline, Poster #56, 16th International Symposium on Human Identification, Grapevine, TX, Sept 26-28, 2005.

***Brian Zubel is a private attorney specializing in the litigation of forensic science issues. He belongs to the jurisprudence section of the American Academy of Forensic Sciences. He may be reached at bzubel@comcast.net.**

Appendix B

Altesleben, Amy (MSP)

From: Suzette Samuels <ssamuels@waynecounty.com>
Sent: Monday, January 06, 2014 9:08 AM
To: Altesleben, Amy (MSP)
Subject: RE: Request for Analysis 1993212116, DPD #93565, MSP lab #NV09-5194

Good morning Amy, I will speak to Brandon about this case. This case is an exception to most other cases. As head of the Wayne County Prosecutor's Office Sexual Assault Unit for Adult Victims, I rarely make a request to have evidence tested outside of submission guidelines, however this case is an aberration. The victim in this matter was found strangled, nude, and left in an abandoned building. The DNA was processed in 2011, but Detroit Police did not submit a warrant request to the WCPO until 2013. The suspect's DNA was found in her vaginal swab. At this point, I have no other evidence in this case. The only way that I can prosecute this 1993 homicide is to use "Other Acts" evidence. The suspect is currently incarcerated for a 1995 homicide in which the victim was found in the same vicinity as the victim in the 1993 case, nude, strangled, and left in an abandoned building. I need to have the fingernail samples tested to possibly prove that the victim fought with this suspect. His DNA in her vaginal swab does not prove that he murdered her.

The suspect was scheduled to be released on parole before I issued the case. I would have liked to have resolved this issue with the lab before I issued the case, but I was in a position where time was of the essence.

Thanks for your consideration, Suzette.

From: Altesleben, Amy (MSP) [mailto:AltesiebenA@michigan.gov]
Sent: Monday, January 06, 2014 8:21 AM
To: Suzette Samuels
Cc: Prince, Rose (MSP); Good, Brandon (MSP); Switalski, Jurgen D. (MSP); olsend243@detroitmi.gov
Subject: RE: Request for Analysis 1993212116, DPD #93565, MSP lab #NV09-5194

Good Morning Miss Samuels,

The evidence submitted on December 20, 2013 for the above listed case does not meet our current submission guidelines as an individual has previously been identified in connection with this case. Because of this, the request for additional analysis has been denied by our Laboratory Director. These items will be returned to the submitting agency.

If you need further information please contact me or Biology Unit Supervisor Brandon Good by e-mail at goodb@michigan.gov or by phone at 248-380-1040.

Thank you,
Amy

Amy Altesleben
Forensic Scientist
Forensic Science Division
Michigan State Police
42145 West Seven Mile Road
Northville, Michigan 48167
Phone: 248-380-1155

"A PROUD tradition of SERVICE through EXCELLENCE, INTEGRITY, and COURTESY"

Exhibit (A)

Altesleben, Amy (MSP)

From: Good, Brandon (MSP)
Sent: Wednesday, January 08, 2014 3:56 PM
To: Suzette Samuels
Cc: Altesleben, Amy (MSP); Switalski, Jurgen D. (MSP); Prince, Rose (MSP); Hall, Glen (MSP)
Subject: RE: Request for Analysis 1993212116, DPD 93565, MSP NV09-5194

Suzette,
I spoke with our Laboratory Director, Jurgen Switalski. He has granted your request to process the fingernail clippings from Ms. Tonya Harris. If you have any additional questions feel free to contact me.
Thanks,

Brandon Good
Biology Unit Laboratory Manager
Forensic Science Division
Michigan State Police
42145 West Seven Mile Road
Northville, Michigan 48167
TX: 248-380-1040

"A PROUD tradition of SERVICE through EXCELLENCE, INTEGRITY, and COURTESY"

From: Suzette Samuels [mailto:ssamuels@waynecounty.com]
Sent: Wednesday, January 08, 2014 3:00 PM
To: Good, Brandon (MSP); Hall, Glen (MSP)
Cc: Altesleben, Amy (MSP)
Subject: Request for Analysis 1993212116, DPD 93565, MSP NV09-5194

Good Morning Brandon. On January 6, 2014 I received an e-mail from Amy Atelesben informing me that the 12/20/13 analysis request was rejected because it does not meet current submission guidelines. I am writing to ask that the request be honored due to extenuating circumstances.

I have charged defendant Johnny Kennedy with open murder for the 1993 homicide of Tonya Harris. Ms. Harris' body was found nude, strangled, and left in an abandoned building in Detroit's Cass Corridor. A 2011 analysis of biological samples taken from the morgue revealed that def Kennedy's DNA was present and resulted in a CODIS hit. While there was a 2011 CODIS hit, the Detroit Police Department did not present a warrant request to the Prosecutor's office until mid-2013. At that time defendant was, and still is incarcerated on a 1995 homicide. I was notified just before the holidays that defendant was going to be released on parole. The only evidence I have in this case is what I stated above. By itself, that is not enough to prosecute def Kennedy for the murder of Tonya Harris. Just because Kennedy's DNA is found in the victim's genitals swabs does not mean that he killed her. As a law enforcement officer, I have a strong opinion that he is the killer, but my strong opinion is not evidence. However, if I use "other acts" evidence stemming from defendant's conviction for the 1995 homicide, I can prosecute this case. Defendant confessed to the 1995 homicide of another woman, whom he strangled, dismembered, and left her nude body in an abandoned building in Detroit's Cass Corridor.

If defendant's DNA is under the fingernails of victim Harris that would strongly suggest that she fought with the defendant, and help to negate the notion that she had consensual sex with this defendant. Anything I can develop with respect to the case in chief, aside from the "other acts" evidence, is of great import. This request for additional testing is not just supplemental evidence in this case, rather it is evidence that is central to the case, and could in fact be very, very pivotal. I should also add that biological evidence (if any exists) regarding the 1995 case for which defendant confessed, has never been tested. That is something I would also like to explore. Again, this is a

Exhibit (B)
Page 1 of 2

situation in which I must tie these two cases together to help ensure a successful prosecution, lest defendant get out to repeat the crime. It is not merely supplemental evidence that I am requesting—it is evidence that goes to the heart of the matter.

Scenarios such as this are bound to periodically crop up as more and more of Detroit's untested biological evidence is tested. It should be of no surprise to anyone that the bodies of murdered people are found in the city, and that even if some foreign DNA is found on that body, that finding alone will often not be enough to prove that the killer was the person who left behind the foreign DNA. As the head of the Wayne County Prosecutor's Office Sexual Assault Unit I have rarely requested that anything be tested outside of standard submission guidelines. Even given the heavy volume of cases submitted to the lab through our office I still only ask for exceptions for extenuating circumstances in few and far between circumstances. This case is one of those circumstances. Having said that, I can only add that I completely understand the need for the submission guidelines as they stand. I also must say that based on my experiences, the lab and lab analysts have never been anything but extremely helpful, and extremely accommodating with respect to the needs of this unit. I am most impressed that analysts are accessible, extremely knowledgeable, and view cases from a scientific and a human perspective.

Please consider this request and advise. Sincerely, Suzette.

Appendix C

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNY RAY KENNEDY,

Defendant-Appellant.

UNPUBLISHED
July 26, 2016

No. 323741
Wayne Circuit Court
LC No. 14-001748-FC

Before: MURRAY, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his conviction, after a jury trial, of first-degree murder, MCL 750.316(1)(a) (willful, deliberate, and premeditated killing). The trial court sentenced defendant to life imprisonment. We affirm.

I. FACTUAL BACKGROUND

On November 17, 1993, a dead body was discovered in the basement of an abandoned office building in Detroit. The body was identified as Tanya Harris, and the medical examiner determined that she died by strangulation. After an investigation, the police had no leads as to who murdered Harris. In 2011, while "working on cold cases," the Detroit Police Department sent a vaginal and rectal swab taken from Harris to the Michigan State Police Crime Lab for DNA testing. After testing, it was determined that the swabs contained DNA from Harris "as well as an additional donor that was determined to be male." When the male DNA was run through the "CODIS System,"[1] it produced a match with defendant. As a result, on December 12, 2013, defendant was charged with open murder for the death of Harris. At the time that he was charged, defendant was already incarcerated in the Michigan Department of Corrections (MDOC).

II. 180-DAY RULE

[1] CODIS stands for Combined DNA Index System and is a database system where DNA profiles from crime scene evidence are kept.

Defendant first argues that the prosecution failed to abide by the 180-day rule and that, as a result, he is entitled to reversal of his conviction. We disagree.

A. STANDARD OF REVIEW

Whether the 180-day rule requires reversal of a conviction is a question of law that this Court reviews de novo. *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003).

B. ANALYSIS

The rule, codified in MCL 780.131 provides that:

> Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, *the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint*. The request shall be accompanied by a statement setting forth the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time or disciplinary credits earned, the time of parole eligibility of the prisoner, and any decisions of the parole board relating to the prisoner. The written notice and statement shall be delivered by certified mail. [MCL 780.131(1); Emphasis added.]

MCL 780.133 governs the failure to comply with this rule, stating that:

> In the event that, within the time limitation set forth in [MCL 780.131], action is not commenced on the matter for which request for disposition was made, no court of this state shall any longer have jurisdiction thereof, nor shall the untried warrant, indictment, information or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

The unambiguous language of MCL 780.131(1) provides that the "MDOC must send written notice, by certified mail, *to the prosecutor* to trigger the 180-day requirement." *People v Rivera*, 301 Mich App 188, 192; 835 NW2d 464 (2013), citing MCL 780.131(1). Despite the clear statutory language, defendant argues that, although the MDOC never sent statutory notice of his incarceration to the prosecutor, the prosecutor nonetheless had actual or implied knowledge of defendant's incarceration from the MDOC's request for a warrant. Our Supreme Court, however, has determined that the trigger of the 180-day period is the time of "notice to the prosecutor" and that an attempt to set an alternate trigger based on actual or constructive knowledge is an impermissible expansion of the statute. See *People v Williams*, 475 Mich 245, 259; 716 NW2d 208 (2006). Further, the statute does not mandate that the MDOC send the notice; it only indicates that the notice triggers the 180-day requirement. See *id*. Because the MDOC never sent the notice at issue, the clock never began to run on defendant's 180 days, and

the 180-day rule was not violated. See *People v Holt*, 478 Mich 851; 731 NW2d 93 (2007) (affirming a decision of this Court which found that there was no violation of the 180-day rule where "the defendant did not establish that the Department of Corrections caused to be delivered by certified mail to the prosecuting attorney the written notice, request, and statement as required by MCL 780.131(1)."); *Rivera*, 301 Mich App at 191, 192 (finding "that the trial court erred when it granted defendant's motion on the basis of the 180-day rule" where "although MDOC sent a notice to the district court, it did not send, by certified mail, a notice to the prosecuting attorney.").

II. HEARSAY EVIDENCE

Next, defendant argues that the trial court erred when it (1) refused to admit Michael Williams's statement contained in Linda Hinton's police statement pursuant to MRE 804(b)(3), MRE 805, and MRE 804(b)(7), and (2) refused to admit Hinton's and Kay Russell's entire police statements pursuant to MRE 804(b)(7). We disagree.

A. STANDARD OF REVIEW

A trial court's decision whether to admit or exclude evidence is reviewed for an abuse of discretion. *People v King*, 297 Mich App 465, 472; 824 NW2d 258 (2012). An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes. *Id*. A preserved error in admitting or excluding evidence is not grounds for reversal unless, after an examination of the entire cause, it appears that it is more probable than not that the error was outcome determinative. *Id.*

B. ANALYSIS

" 'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Generally, hearsay is not admissible unless it falls under an exception provided by the rules of evidence. MRE 802. MRE 805 provides that "[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."

MRE 804(b)(3) provides that, when a declarant is unavailable as a witness, a statement against interest is not excluded by the hearsay rule. A "statement against interest" is defined as follows:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable person in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. [MRE 803(b)(3)].

In evaluating whether a statement against penal interest bears sufficient indicia of reliability to allow it to be admitted, courts must evaluate the circumstances surrounding the making of the statement as well as its content. *People v Barrera*, 451 Mich 261, 275-276; 547 NW2d 208 (1996), citing *People v Poole*, 444 Mich 151, 165; 506 NW2d 505 (1993), overruled in part on other grounds by *People v Taylor*, 482 Mich 368 (2008).

> The presence of the following factors would favor admission of such a statement: whether the statement was (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues, or confederates—that is, to someone to whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener. [*Poole*, 444 Mich at 165.]

MRE 804(b)(7) provides for admission of a statement that is not specifically covered by any of the other hearsay exceptions under MCR 804(b),

> . . . but [has] equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. . . .

In analyzing MRE 803(24), the identical equivalent to MRE 804(b)(7),[2] our Supreme Court has explained that the following four elements must be established to admit a statement under the rule:

> (1) it must have circumstantial guarantees of trustworthiness equal to the categorical exceptions, (2) it must tend to establish a material fact, (3) it must be the most probative evidence on that fact that the offering party could produce through reasonable efforts, and (4) its admission must serve the interests of justice. Also, the offering party must give advance notice of intent to introduce the evidence. [*People v Katt*, 468 Mich 272, 279; 662 NW2d 12 (2003).]

The following factors are considered in determining whether statements have particularized guarantees of trustworthiness considering the totality of the circumstances:

> (1) the spontaneity of the statements, (2) the consistency of the statements, (3) lack of motive to fabricate or lack of bias, (4) the reason the declarant cannot testify, (5) the voluntariness of the statements, i.e., whether they were made in response to leading questions or made under undue influence, (6) personal knowledge of the declarant about the matter on which he spoke, (7) to whom the statements were made . . . , and (8) the time frame within which the statements

[2] MRE 804(b)(7) is applicable when the declarant is unavailable, whereas MRE 803(24) applies to out of court statements by an available declarant.

> were made. [*People v Lee*, 243 Mich App 163, 178; 622 NW2d 71 (2000) (citations omitted).]

Without a showing of a particularized guarantee of trustworthiness, a statement will be deemed presumptively unreliable and therefore inadmissible. *People v Smith*, 243 Mich App 657, 688; 625 NW2d 46 (2000).

First, defendant's argument related to "Williams' statement" is unclear. While defendant argues that "Williams' statement should have been admissible as a statement against interest under MRE 804(b)(3)," Williams's own statement to the police contains no statement that could be construed as against his interest. Instead, it seems that defendant attempts to argue that Williams's statement asking Hinton, "[D]id you hear I killed [Tanya Harris?]", which is contained in Hinton's statement to police, should have been admitted at trial. However, contrary to defendant's argument, while the entirety of Williams's and Hinton's statements to police were not admitted at trial, Williams's statement asking Hinton, "[D]id you hear I killed [Harris?]", was admitted at trial and presented to the jury through Officer Deborah Monti's testimony. During trial, Officer Monti testified that she interviewed Hinton and that Hinton told her that Williams had "*came up to her and said did you know I killed [Harris]*?" [Emphasis added.] Thus, even assuming without deciding that the trial court erred in excluding Williams's statement contained in Hinton's statement to police from being admitted at trial in its written form, defendant cannot show that it is more probable than not that the error was outcome determinative. See *King*, 297 Mich App at 480 (finding that the error in excluding proposed evidence was harmless where "that evidence was implicitly already before jury."); *McLaughlin*, 258 Mich App at 656-657 (finding that the exclusion of evidence, "if erroneous, was also harmless" where although the evidence that was admitted "was not the sort of explicit evidence defendant hoped to get before the jury, it was sufficient" to get the fact before the jury).

Second, defendant argues that "Hinton's remarks should have been admitted." In her statement to police, Hinton asserted that Williams came up to her and said, "[D]id you know I killed [Harris]?" However, again, while Hinton's written statement was excluded, Officer Monti testified that Hinton told her that Williams had "came up to her and said did you know I killed [Harris]?" Hinton's statement also asserted that Williams had previously sexually assaulted her in vacant buildings. These allegations were not admitted at trial, and defendant argues that they were admissible pursuant to MRE 804(b)(7). However, defendant has failed to demonstrate that Hinton's statement met the criteria for admission under MRE 804(b)(7). Hinton's statement to the police was arguably evidence of a material fact because it would infer that Williams, and not defendant, could have killed Harris. Arguably, it would also be more probative on the point of whether Williams killed Harris than any other evidence that the defense could procure through reasonable efforts, as both the defense and prosecution were unable to produce Williams for trial. However, to admit evidence pursuant to MRE 804(b)(7), "[t]he first and most important requirement is that the proffered statement have circumstantial guarantees of trustworthiness equivalent to those of the categorical hearsay exceptions," *Katt*, 468 Mich at 290, and without a showing of a particularized guarantee of trustworthiness, a statement is presumptively unreliable and, therefore, inadmissible, *Smith*, 243 Mich App at 688. Defendant makes no arguments regarding the trustworthiness of Hinton's statement, and Hinton's statement does not bear sufficient indicia of reliability. While it seems that Hinton's allegation regarding the sexual assault was spontaneous, the record is lacking regarding Hinton's potential bias and motive to

fabricate, or other variables relating to her reliability. Because the statement lacks any indicia of reliability, the trial court did not abuse its discretion by refusing to admit it under MRE 804(b)(7).

Third, defendant argues that the trial court erred by refusing to admit Russell's statement to police that she observed Harris with Williams the night before her death, as it was admissible under MRE 804(b)(7). However, again, while Russell's entire written statement was not admitted at trial, police officers testified to its substance. In fact, Officer Vernon Humes testified that Russell stated that she had seen Williams with Harris at 9:00 p.m. the night before Harris's body was discovered and that Williams had initially been detained as a result of that statement. Thus, again, even assuming without deciding that the trial court erred in excluding Russell's entire written statement from being admitted at trial, defendant cannot show that it is more probable than not that the error was outcome determinative. See *King*, 297 Mich App at 480 (finding that the error in excluding proposed evidence was harmless where "that evidence was implicitly already before jury."); *McLaughlin*, 258 Mich App at 657 (finding that the exclusion of evidence, "if erroneous, was also harmless" where although the evidence that was admitted "was not the sort of explicit evidence defendant hoped to get before the jury, it was sufficient" to get the fact before the jury).

In sum, while the written statements were not admitted at trial, Russell's statement placing Williams with Harris the night before her body was discovered, and Hinton's allegation that Williams asked her if she heard he had killed Harris were both presented to the jury through Officer Monti's testimony. Thus, defendant cannot show that it is more probable than not that any alleged error in excluding the statements in their written form was outcome determinative.

III. APPOINTMENT OF A DNA EXPERT

Defendant next argues that he was denied his due process right to present a defense by the court's failure to appoint a DNA expert. US Const, Am VI; Const 1963, art 1 § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). We disagree.

A. STANDARD OF REVIEW

A trial court's decision on a motion to appoint an expert witness is reviewed for an abuse of discretion. *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003), citing MCL 775.15. However, "[t]his Court reviews de novo whether defendant suffered a deprivation of his constitutional right to present a defense." *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009).

B. ANALYSIS

Before trial, the defense moved for the appointment of a DNA expert to "aid the defense" because "this is a case of scientific and complex nature," and defense counsel wanted to "consult with [the expert] in his expertise analysis" given the fact that counsel was "going to get a lot of scientific evidence here[.]" The defense did not anticipate calling the expert to testify at trial and, instead, only intended to consult the expert and utilize the expert's knowledge in order to prepare for cross-examination of the prosecution's witnesses. In particular, the defense argued that a DNA expert was necessary because "a prosecution based largely or entirely upon the

presentation of identification evidence based upon DNA poses an especially technical and complex range of issues for defense counsel." Accordingly, in order to rebut the evidence presented by the prosecution, the defense argued that defense counsel must be "educated and schooled to no small extent in the science and accepted protocols of DNA extraction, preservation, testing, as well as dangers of contamination and the steps and measures taken to document a particular test, and to maintain the proper calibration of testing equipment." As such, the defense contended that appointment of an expert was necessary in order for defense counsel to "be able to confront the witnesses and to shed light on any questionable issues that may have occurred during the lengthy storage and testing procedures." The trial court held that the defense may "talk to [the expert]" and "read up on him," but the court declined to appoint an expert.

Pursuant to the Due Process Clause, "states may not condition the exercise of basic trial and appeal rights on a defendant's ability to pay for such rights." *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997), citing *Ake v Oklahoma*, 470 US 68; 105 S Ct 1087; 84 L Ed 2d 53 (1985). Fundamental fairness precludes a state from denying an indigent defendant "an adequate opportunity to present their claims fairly within the adversary system." *Id*. (quotation marks and citation omitted).

Pursuant to MCL 775.15, a trial court may appoint and pay for expert witnesses for indigent defendants. However, among other things, a defendant must "make it appear to the satisfaction of the judge presiding over the court wherein such trial is to be had, by his own oath, or otherwise, that there is a material witness in his favor within the jurisdiction of the court, without whose testimony he cannot safely proceed to a trial[.]" MCL 775.15. "[A] trial court is not compelled to provide funds for the appointment of an expert on demand." *Tanner*, 469 Mich at 442. Rather, "to obtain appointment of an expert, an indigent defendant must demonstrate a nexus between the facts of the case and the need for an expert." *Id*. at 443. Stated differently, "a defendant is not entitled to a DNA expert without making a particularized showing of a need for the expert." *Leonard*, 224 Mich App at 583-584. "It is not enough for the defendant to show a mere possibility of assistance from the requested expert. Without an indication that expert testimony would likely benefit the defense, a trial court does not abuse its discretion in denying a defendant's motion for appointment of an expert witness." *Tanner*, 469 Mich at 443 (quotation marks and citation omitted).

In this case, the trial court did not abuse its discretion in denying defendant's motion for the appointment of a DNA expert. Defendant failed to show more than a "mere possibility" that an expert would be beneficial to the defense, as the defense did not offer, nor does the dissent offer, any indication beyond its own speculation that a DNA expert could have provided information that would have been beneficial to the defense. See *id*. Rather, defendant specifically argued that defense counsel needed additional knowledge in order to confront the witnesses regarding "*any* questionable issues that *may have* occurred during the lengthy storage and testing procedures." (Emphasis added.) Because neither the defendant nor the dissent identify any specific concerns regarding the DNA evidence in this particular case or provide any indication that the DNA evidence was flawed—and, instead, only articulate generalized concerns regarding the complex, scientific nature of the evidence—there is no basis for us to conclude that the trial court's decision constituted an abuse of discretion.

On appeal, defendant asserts that an expert could have helped him "determine the impact, if any, after an audit uncovered serious errors in numerous cases resulting in the shut-down of the Detroit Police Crime Lab" in 2008. However, the DNA testing in the case was done in 2011, well after any possible shut down of the crime lab. Moreover, defendant cites no authority in support of his proposition that such generalized concerns trigger the court's duty to provide an expert. Again, to the contrary, the mere "possibility of assistance from the requested expert" is insufficient. *Tanner*, 469 Mich at 443.

Thus, the trial court did not abuse its discretion by refusing to appoint a DNA expert. Likewise, we find no basis for concluding that defendant's constitutional rights were violated on that basis and because defendant had an adequate opportunity to present his arguments in the adversarial system, particularly through counsel's thorough cross-examination of the state's witnesses. *Leonard*, 224 Mich App at 580.

IV. MRE 404(B) EVIDENCE

Next, defendant argues that the trial court abused its discretion in admitting, under MRE 404(b), evidence of his1995 conviction for murdering Cynthia McGee because the evidence was not relevant and its probative value was outweighed by its unfair prejudice. As a result, defendant argues that its admission constituted "a denial of fundamental fairness," which requires reversal. We disagree.

A. STANDARD OF REVIEW

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). A court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Murphy (On Remand)*, 282 Mich App 571, 578; 766 NW2d 303 (2009).

B. ANALYSIS

Evidence of crimes, wrongs, or other acts is inadmissible to show a defendant's propensity to act in conformity with those acts. MRE 404(a); *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). However, MRE 404(b)(1) provides that such evidence:

> . . . may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The prosecutor bears the burden of showing that the evidence is relevant to a proper purpose or otherwise proves a fact other than the defendant's character or criminal propensity. *People v Mardlin*, 487 Mich 609, 615; 790 NW2d 607 (2010).

In order for other acts evidence to be admissible, the trial court must determine (1) whether the evidence is offered for "something other than a character to conduct or propensity theory" and offered for a proper purpose under MRE 404(b), (2) whether the evidence is relevant

"to an issue of fact of consequence at trial" under MRE 401 and MRE 402, and (3) whether the probative value of the evidence is substantially outweighed by unfair prejudice under MRE 403. *People v Sabin*, 463 Mich 43, 55; 614 NW2d 888 (2000), citing *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993).

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Evidence is relevant to show a common scheme or plan when the charged crime and the prior act "are sufficiently similar to support an inference that they are manifestations of a common scheme or plan." *Sabin*, 463 Mich at 63-64. While "general similarity between the charged act and the prior bad act is not enough to show a pattern," *People v Smith*, 282 Mich App 191, 196; 772 NW2d 428 (2009), "distinctive and unusual features are not required to establish the existence of a common design or plan. The evidence of uncharged acts needs only to support the inference that the defendant employed the common plan in committing the charged offense," *People v Hine*, 467 Mich 242, 252-53; 650 NW2d 659 (2002), citing *Sabin*, 463 Mich 65-66. However, when similar acts are being used to prove identity, "a high degree of similarity" is required between the prior conduct and the charged offense. *People v Golochowicz*, 413 Mich 298, 325; 319 NW2d 518 (1982). Specifically, there must be "special characteristics so uncommon, peculiar and distinctive as to lead compellingly to the conclusion that all were the handiwork of the defendant because all bore his distinctive style or 'touch.' " *Id*. To use prior acts to prove identity, "more is demanded than the mere repeated commission of crimes of the same class, such as repeated burglaries or thefts. The [commonality of circumstances] must be so unusual and distinctive as to be like a signature." *Id*. at 310-311 (alteration in original).

All relevant evidence is prejudicial to some extent. *Murphy (On Remand)*, 282 Mich App at 583-583. "Unfair prejudice exists . . . where either a probability exists that evidence which is minimally damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect, or it would be inequitable to allow the proponent of the evidence to use it." *Id*. at 583 (quotation marks and citations omitted). Unfair prejudice also exists if the evidence "inject[s] considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *People v Pickens*, 446 Mich 298, 337; 521 NW2d 797 (1994) (quotation marks and citation omitted).

The prosecution sustained its burden at trial in demonstrating that defendant's prior murder conviction was offered for a proper purpose under MRE 404(b). The prosecution presented details of the 1995 murder conviction of McGee to show defendant's common scheme or plan in committing the murder of Harris[3] and, although not expressly offered as such, to show the identity of Harris's perpetrator was defendant. On appeal, defendant acquiesces that the prosecution showed defendant had sex with Harris, but he continues to deny killing her. Using

[3] See *People v Drohan*, 264 Mich App 77, 87; 689 NW2d 750 (2004) (finding that the prosecutor introduced the prior acts evidence for a proper purpose where the "common features" where intended to show that the "defendant had a common scheme of suddenly grabbing unwilling women and seeking immediate sexual gratification from them.")

prior acts to prove identity is a proper purpose under MRE 404(b). See *People v Ho*, 231 Mich App 178, 187; 585 NW2d 357 (1998) (finding that "the similar-acts evidence was admitted for a proper purpose, namely, to prove that defendant committed this crime."). While using prior bad acts to prove identity requires a higher level of similarity between prior crime and present conduct, McGee's murder and Harris's murder were sufficiently similar to be admitted for this purpose. Both murders occurred in the Cass Corridor, both victims were black prostitutes with drug problems, both were left nude in an abandoned building, and both were strangled to death. The same facts establish defendant's common plan or scheme to target prostitutes in the Cass Corridor for sex, engage in sexual relations with them in vacant buildings, and then strangle them. See *Ho*, 231 Mich App at 186-187 (finding the bad act was sufficiently similar to prove identity where the same caliber handgun was used in both, the same caliber shell was left at each, the locations were two miles apart, both occurred at night, and within two weeks of each other). Any error in admitting the other acts evidence to prove identity is harmless, where the evidence was also admissible for the other proper noncharacter purpose to show a common plan or scheme.

We also find that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The similarities between McGee's murder and Harris's murder make the evidence highly probative of a common scheme or plan and relevant to prove identity. Additionally, the trial court took steps to decrease the danger of unfair prejudice. The court ordered that defendant's police interview be redacted to eliminate any mention of the fact that McGee was dismembered and provided a limiting instruction. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, the trial court did not err by admitting the evidence pursuant to MRE 404(b). See *People v Roscoe*, 303 Mich App 633, 646; 846 NW2d 402 (2014) (finding where the similarity between the other act and the conduct at issue made the evidence highly probative of a common scheme or plan, and the trial court provided a limiting instruction, the trial court did not err by admitting the evidence pursuant to MRE 404(b)).

V. SUFFICIENCY OF THE EVIDENCE

Next, defendant argues that there was insufficient evidence presented at trial to support his conviction of first-degree premeditated murder. We disagree.

A. STANDARD OF REVIEW

A defendant's challenge to the sufficiency of the evidence is reviewed de novo. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012).

B. ANALYSIS

In a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999); *People v Harverson*, 291 Mich

App 171, 175; 804 NW2d 757 (2010). A prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000); *People v Chapo*, 283 Mich App 360, 363-364; 770 NW2d 68 (2009). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (citation omitted). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

In order to convict a defendant of first-degree premeditated murder, the prosecution must prove that there was an "(1) the intentional killing of a human (2) with premeditation and deliberation." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). Premeditation is an essential element of first-degree, premeditated murder. *People v DeLisle*, 202 Mich App 658, 660; 509 NW2d 885 (1993). Although there is no specific time requirement, sufficient time must have elapsed to allow the defendant to take a "second look." *Id*.

Additionally, identity is an essential element in every criminal prosecution, *People v Yost*, 278 Mich App 341, 354; 749 NW2d 753 (2008), and the identity of the defendant as the perpetrator of the crime is a fact that must be proven beyond a reasonable doubt, see *People v Davis*, 241 Mich App 697, 699-700; 617 NW2d 381 (2000). The prosecution may establish identity by circumstantial evidence and any associated reasonable inferences. *People v Nelson*, 234 Mich App 454, 459; 594 NW2d 114 (1999).

At trial, a medical examiner testified that Harris's cause of death was strangulation. His conclusion was based on Harris's injuries, which resulted in "numerous abrasions an [sic] scrapings over the – both sides of the interior aspect of the neck" and "hemorrhage inside the muscles of the neck and . . . a fracture of one of the bones inside the neck." These facts are sufficient to show that the killing was intentional and, thus, establish the first element of first-degree murder. The medical examiner also testified that strangulation results from "20 to 30 seconds of non-interrupted compression" on the neck. Based on that amount of time, a reasonable trier of fact could infer that defendant had time to take a second look before killing. See *Johnson*, 460 Mich at 733, citing *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987) (finding that "evidence of manual strangulation can be used as evidence that a defendant had an opportunity to take a 'second look.' "). Additionally, Harris's body was found in an abandoned office building. A reasonable factfinder could infer that the killer left the body in the abandoned building to conceal the crime. Evidence that a defendant attempted to conceal the crime can also support a finding that the crime was premeditated. *People v Gonzalez*, 468 Mich 636, 642; 664 NW2d 159 (2003). Thus, a rational juror could conclude that Harris was killed intentionally and with premeditation.

The final element is defendant's identity as the murderer, and defendant asserts that there was no credible evidence that he was the person who killed Harris. Defendant argues that the evidence only shows that he had sex with Harris, not that he killed her. Because there was no eyewitness to the actual killing, defendant's identity as the killer was established by circumstantial evidence. However, there is sufficient evidence implicating defendant in Harris's murder, as defendant was known to frequent the neighborhood where Harris's body was discovered, defendant had an admitted history with prostitutes, and defendant's DNA was found

on Harris. Moreover, a rational trier of fact could infer from defendant's prior conviction for McGee's murder that defendant also killed Harris in a similar fashion. Although defendant argues that his DNA found on Harris is insufficient to link him to her murder, this same challenge was presented to the jury during cross-examination and closing argument. Because this Court may not interfere with the jury's role of determining issues of weight and credibility, *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), the evidence was sufficient to support defendant's conviction of first-degree premeditated murder.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

Last, defendant argues that he was denied the effective assistance of counsel. He claims that defense counsel's performance fell below an objective standard of reasonableness when he "refer[red] to defendant as a criminal during jury selection" and when he proceeded to trial without having obtained all of the discovery. We disagree.

A. STANDARD OF REVIEW AND APPLICABLE LAW

A timely motion for a new trial, which raises the issue of ineffective assistance of counsel, preserves the issue for appellate review. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). Alternatively, to preserve the issue for appeal, a criminal defendant may request a *Ginther* hearing to make a separate factual record supporting the claim of ineffective assistance of counsel. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). In this case, defendant did not move for a new trial or request a *Ginther* hearing below,[4] and as a result, this issue is not preserved. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Generally, the trial court's findings of fact are reviewed for clear error and the questions of constitutional law are reviewed de novo. *Id*. Unpreserved claims of ineffective assistance of counsel can still be reviewed, but review is limited to errors apparent in the record below. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

The United States and Michigan Constitutions guarantee a defendant the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 US at 694.

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[4] In his brief on appeal, defendant did request a remand for a *Ginther* hearing to explore the issues of alleged ineffective assistance of counsel. While his request is timely, MCR 7.211(C)(1)(a), defendant has not set forth, by affidavit or offer of proof, additional facts that would be established at a hearing if one was held, MCR 7.211(C)(1)(a)(ii).

Effective assistance of counsel is presumed, and the defendant bears a substantial burden of proving otherwise. *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012). A defendant can overcome the presumption by showing that counsel failed to perform an essential duty and that failure was prejudicial to the defendant. *People v Reinhardt*, 167 Mich App 584, 591; 423 NW2d 275 (1988), remanded on other grounds 436 Mich 866 (1990). When claiming ineffective assistance due to defense counsel's unpreparedness, a defendant must show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). However, counsel's strategic judgments are afforded deference. *Wiggins v Smith*, 539 US 510, 521-522, 528; 123 S Ct 2527; 156 L Ed 2d 471 (2003).

B. ANALYSIS

Defendant argues that defense counsel was ineffective when he "refer[red] to defendant as a criminal during jury selection." We disagree.

Defendant cannot overcome the strong presumption that counsel's performance was trial strategy nor demonstrate the requisite prejudice necessary to establish a claim of ineffective assistance of counsel. Contrary to defendant's assertions, defense counsel never referred to defendant as a criminal during jury selection, or at any other point during trial. Instead, because counsel knew that the prosecution would present MRE 404(b) evidence at trial, during voir dire, defense counsel stated that if "a person has been convicted of a crime in the past [it] is irrelevant as to whether or not they committed a new crime in the present day" and that "certain evidence of a prior crime maybe [sic] used for narrow reasons." Defense counsel also stated that past crimes can never be used "for the purpose of thinking that well he committed a crime before he has to be guilty of this crime not irrespective of the evidence in this case" and that "[t]he fact of a prior act cannot be a substitute for all of the evidence in the new case." Defense counsel then asked each prospective juror if they would be able to "follow that rule" and if they could use evidence of a prior crime "only for the narrow purpose that the Judge [permits]." In sum, defense counsel did not call defendant a "criminal" during jury selection, thereby prejudicing the jury against him. Instead, defense counsel properly inquired into possible prejudice resulting from defendant's prior conviction. As a result, defendant cannot overcome the strong presumption that counsel's performance was trial strategy nor demonstrate that defense counsel was ineffective in this regard.

Defendant next argues that defense counsel was ineffective when he proceeded to trial without obtaining all of the discovery. Again, we disagree.

Again, defendant cannot establish the required showing of deficient performance necessary to establish a claim of ineffective assistance of counsel. Contrary to defendant's assertions, defense counsel's questions, remarks, and arguments throughout trial demonstrate that he was familiar with the case and prepared for trial. The record shows that there were some issues with discovery throughout the case. Defense counsel made three pretrial motions for discovery. The first was denied as overbroad, and the second became moot when defense counsel stated that he was set to receive the requested discovery that day. Defense counsel's third motion, heard approximately one week before trial was scheduled to begin, claimed that he did not receive discovery related to the forensic scientists, their laboratory error rates, or the police manual. Despite the prosecutor's refutation that defense counsel was provided with those

items, the court granted defense counsel an adjournment to obtain the information. Given these circumstances, defendant does not specify which discovery materials defense counsel lacked on the day of trial. The record demonstrates that defense counsel was not provided and had not obtained a copy of the police manual. However, this omission alone did not prejudice defendant sufficiently to show that counsel's performance fell below an objective standard of reasonableness. While the manual would have presumably been helpful during the cross-examination of both forensic scientists, defense counsel cross-examined each expert extensively, even citing scholarly articles related to error rates. Defendant's argument that counsel was ineffective for failing to conduct an independent investigation to obtain outstanding discovery materials is also without merit. Again, defendant fails to identify which materials were wanting on the day of trial. Defendant relies solely on the fact that his counsel filed a third motion for discovery a week before trial to infer that counsel was unprepared. The court's adjournment, however, gave defense counsel additional time to prepare, which defendant does not account for. In the absence of a *Ginther* hearing, this Court does not know what arsenal of discovery was at defense counsel's disposal, or his strategic reasons for its use. From the record before us, it is not apparent that counsel's alleged unpreparedness constituted a deficient performance.

Affirmed.

/s/ Christopher M. Murray
/s/ Michael J. Riordan

Appendix D

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 26, 2016
v	No. 323741 Wayne Circuit Court
JOHNNY RAY KENNEDY, Defendant-Appellant.	LC No. 14-001748-FC

Before: MURRAY, P.J., and STEPHENS and RIORDAN, JJ.

STEPHENS, J. (*dissenting*)

Because I believe that defendant was denied his constitutional right to present a defense by the trial court's denial of his motion to appoint a DNA expert, I respectfully dissent. US Const, Am VI; Const 1963, art 1 § 20.

Before trial, defendant moved for the appointment of Brian Zubel, a recognized expert in the fields of forensic science and DNA litigation, to assist the defense to

> zealously confront the witnesses and evidence called in the prosecution's case in chief, [to] be educated and schooled to no small extent in the science and accepted protocols of DNA extraction, preservation, testing, as well as dangers of contamination and the steps and measures taken to document a particular test, and to maintain the proper calibration of testing equipment.

The court stated that defendant may "talk to [the expert]" and "read up on him," but the court declined to appoint an expert. I believe the trial court erred in denying defendant's motion.

In *Mathews v Eldridge*, the Supreme Court stated that

> due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [424 US 319, 335; 96 S Ct 893, 903; 47 L Ed 2d 18 (1976)].

The private interest at stake here is defendant's liberty and his right to present a defense to the charge against him. These interests have been recognized as substantial. "The interest of the individual in the outcome of the State's effort to overcome the presumption of innocence is obvious and weighs heavily[.]" *Ake v Oklahoma*, 470 US 68, 78; 105 S Ct 1087; 84 L Ed 2d 53 (1985).

This defendant could not safely proceed to trial without DNA expertise. See MCL 775.15. The majority's review of defendant's request for an expert faults the defense for not identifying how a DNA expert would have provided "information beneficial to the defense," for not identifying "any specific concerns regarding the DNA evidence," and for failing to "provide any indication that the DNA evidence was flawed." The majority's analysis, while precisely identifying the problem with challenging DNA expert evidence without the assistance of an expert, equally begs the question of why defendant would need an expert. An expert can educate counsel regarding which questions to ask and which theories to pursue. In other words, defendant does not know the inherent concerns with DNA evidence or all the ways in which it may be flawed without an expert to bring those issues to light. In order "[t]o make a reasoned judgment about whether evidence is worth presenting, one must know what it says." *People v Ackley*, 497 Mich 381, 393; 870 NW2d 858 (2015) quoting *Couch v Booker*, 632 F3d 241, 246 (CA 6, 2011). Indeed, in some instances counsel will be found ineffective for failing to investigate and secure expert assistance for the defense. *Ackley*, 497 Mich at 393.

This is a DNA case. Nearly two decades ago DNA evidence was collected from the victim, who was both strangled and sexually assaulted. It was only when that evidence was tested that defendant was charged with murder. The age and size of the DNA sample, its storage process and testing methodology were all likely issues of contention in this case. Trial counsel understood that this DNA evidence was the lynchpin of the prosecutions' case and asked the court for the appointment of Zubel, an eminently qualified expert to assist him in preparing his client's defense. Zubel was a former prosecutor who trained prosecutors on litigating forensic science issues in criminal cases. The trial court however, denied Zubel's appointment. The court seemed to presume that despite the scientific nature of the evidence at issue, counsel could prepare for examination of the prosecutions' witnesses and otherwise prepare an effective litigation strategy, including plea considerations, through reading and solicitation the advice of some mythical expert who would consult for free. To the contrary, this is a case like *Ake* where "[w]ithout a[n] [expert's] assistance, the defendant cannot offer a well-informed expert's opposing view, and thereby loses a significant opportunity to raise in the jurors' minds questions about the State's proof of an aggravating factor." 470 US at 84. At trial, the prosecution presented two forensic experts. Through these experts, the jury learned about DNA, different types of DNA testing, the DNA testing results in this case, and the meaning of the test results as applied to defendant. It was unfair for defense counsel to be expected to thoroughly challenge these experts without, at least the opportunity to consult with an expert of its own.

I am mindful that the government has a legitimate interest in the conservation of public funds. "Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed." *Mathews*, 424 US at 348. "At some point the benefit of an additional safeguard to the individual affected by the administrative action

and to society in terms of increased assurance that the action is just, may be outweighed by the cost." *Id*. Counsel in this case was very conservative in his request for funds to consult with the expert and not to retain him for trial. It would not have been error for the court to grant that request and require that a second request to retain the expert be made when and if counsel had a particularized issue on which testimony was needed. However, the need articulated by counsel was more than sufficient to require appointment of a consulting expert.

/s/ Cynthia Diane Stephens